APPENDIX A

OPINION OF COURT

(Filed June 13, 1967)

In The United States District Court for the District of Maryland

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Civil Action No. 18005

State of Maryland, et al.,

Plaintiffs,

v.

W. Willard Wirtz, Secretary of Labor United States Department of Labor, et al.,

Defendants.

Before: Winter, Circuit Judge, Thomsen, Chief Judge, and Northrop, District Judge.

WINTER, Circuit Judge:

This is an action brought by the State of Maryland, in which twenty-five other States have intervened as parties plaintiff, asking the Court to declare unconstitutional the 1966 Amendments to the Fair Labor Standards Act[1] (the "1966 Amendments") insofar as they apply to employees of the plaintiff States, and to enjoin enforcement of the Act, as amended, against the States. Although the 1966 Amendments extend the Act's coverage to employees of enterprises, whether public or private, engaged in the operation of schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley and motorbus carriers, the States, in briefs and

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[1] Public Law, 89-601, 80 Stat. 830, amending the Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201, *et seq.*

oral argument, challenge application of the Act only to public schools, hospitals and related institutions; and this Court will limit its consideration accordingly.

Defendants have filed a motion to dismiss or, in the alternative, a motion for summary judgment. Plaintiffs have filed cross-motions for summary judgment. The parties have entered into extensive stipulations of fact with regard to Maryland, Texas and Ohio. It is agreed that these data may be taken as representative of the situation in the other plaintiff States. Some objections to relevancy and materiality have been raised, but the Court is satisfied that the conclusions reached herein would not be affected by the exclusion of any of the stipulation evidence.

Introduction

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq.*, was first enacted in 1938 as a result of Congressional findings, recited in § 2(a) of the Act, 29 U.S.C.A. § 202, that:

> "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

It was therefore declared to be the policy of Congress, through the exercise of its power to regulate commerce among the several states "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employments or earning power." 29 U.S.C.A. § 202(b). Congress

accordingly provided that employers must pay those employees who were "engaged in commerce or in the production of goods for commerce" a minimum hourly wage, 29 U.S.C.A. § 206(a), and one and one-half times their regular hourly rate for weekly hours over a specified maximum, 29 U.S.C.A. § 207(a)(1). States and their political subdivisions were excluded from the Act's definition of "Employer." 29 U.S.C.A. § 203(d).

The constitutionality of the original Act was sustained in *United States v. Darby*, 312 U.S. 100 (1941). The Court stated, *inter alia*, that the power of Congress over commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at p. 118.[2]

The Act has been amended several times,[3] but until the 1966 Amendments state employees were not brought within its coverage.

In 1961 the "enterprise" concept was introduced. 29 U.S.C.A. § 203(r), 75 Stat. 65. In addition to employees previously covered — those personally engaged in interstate commerce or in the production of goods for commerce — the Act was extended to cover "the related activities performed (either through unified operation or common

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[2] Subsequent decisions have pointed out that "Congress did not exercise in this Act the full scope of the commerce power," but rather chose "to regulate only part of what it constitutionally can regulate." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-571 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-522 (1942). See also *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943); *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943); *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 313 (1960).

[3] The principal amendatory enactments have been the Portal-to-Portal Act of 1947 (61 Stat. 84), the Fair Labor Standards Amendments of 1949 (63 Stat. 910), the Fair Labor Standards Amendments of 1955 (69 Stat. 711), the Fair Labor Standards Amendments of 1961 (75 Stat. 65), the Equal Pay Act of 1963 (77 Stat. 56), and the Fair Labor Standards Amendments of 1966 (80 Stat. 830).

control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor." An "enterprise engaged in commerce or in the production of goods for commerce," and therefore covered by the Act, was defined in terms of a minimum annual dollar volume of gross sales and, in some instances, the particular type of business involved. See 29 U.S.C.A. § 203(r) and (s). The validity and scope of the enterprise concept has not yet been decided by the Supreme Court.

The 1966 Amendments extended the enterprise basis of coverage and brought within the Act public as well as private enterprises engaged in operating schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley or motorbus carriers.[4] The definition of "employer" in 29 U.S.C.A. § 203(d) was amended to eliminate the existing exclusion of States and their political subdivisions insofar as they engaged in those activities. In fitting employees first covered by the 1966 Amendments into the minimum wage and maximum hour scale of employees theretofore covered, the 1966 Amend-

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[4] In addition to amending the Act's definition of "employer" (see text, *infra*), other pertinent changes effected by the 1966 Amendments were: an existing exemption for hospitals and certain related institutions and schools for handicapped or gifted children, formerly contained in §13(a)(2)(iii), was eliminated, and such institutions and schools, as well as elementary and secondary schools and institutions of higher learning, were designated in §3(s)(4) as types of enterprises whose coverage would not depend on an annual gross volume test; the existing annual gross volume test for local transit enterprises (in former §3(s)(2)) was lowered from $1 million to $500,000 until Feb. 1, 1969 and to $250,000 thereafter (§3(s)(1)); and the definition of "enterprise" in §3(r) was amended to provide that local transit operations, the above described schools and hospitals and related institutions, whether public or private or for profit or not for profit, would be regarded as operated for a "business" purpose.

ments provide for an escalation of the minimum wage and of maximum hours over a period of five years.[5]

The 1966 Amendments, which thus had the effect of extending the minimum wage and overtime provisions of the Fair Labor Standards Act to a *portion* of the labor market not theretofore covered,[6] are attacked insofar as they extend coverage to certain employees of public schools, hospitals and related institutions. Despite the impression sought to be created by several of the plaintiff States, extension of the Act to certain groups of state employees was not a concept first advanced in the Second Session of the 89th Congress under circumstances which would have prevented the States from presenting their views in opposition to the proposal, had they sought to keep abreast of matters under consideration by Congress.

The first legislative effort to extend coverage to some state employees occurred in the First Session of the 89th Congress.[7] During the Second Session of the 89th Congress,

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[5] Thus, while the minimum wage for employees theretofore covered by the Act is $1.40 per hour, for the first year after February 1, 1967, and $1.60 per hour thereafter, minimum wages for employees newly covered are $1.00 per hour, for the first year and increase 15¢ per year for each year thereafter until the level of $1.60 is reached. Similarly, overtime must be paid to employees theretofore covered who work in excess of 40 hours per week, while overtime must be paid to newly covered employees who work more than 44 hours, the first year, 42 hours, the second year, and 40 hours each year thereafter, respectively, after February 1, 1967.

[6] While the 1966 Amendments to the Fair Labor Standards Act, *inter alia*, extend the Act's coverage to employees of schools, hospitals and related institutions, electric railways, trolley and motorbus systems, *whether public or private*, not every employee of such enterprise is made subject to the Act. Section 13 of the Act, 29 U.S.C.A. §213, as it existed prior to the effective date of the 1966 Amendments, and as amended by the 1966 Amendments, exempts certain classes of employees. For our purposes, the significant exemption is that of a person "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary school * * *)."

[7] During the 89th Congress, 1st Session, H. R. 8259, was introduced in response to a special message of President Johnson urging,

when H. R. 13712, which, as amended, was enacted as the 1966 Amendments, was introduced into the House of Representatives, it contained language which would have extended coverage (subject to the exemptions in § 13)[8] to any person "in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally handicapped or gifted children, or an institution of higher education (*regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit*) * * *."[9] (Emphasis supplied.) During legislative consideration of the bill, the only variation as to the extent of coverage, pertinent to this law suit, was whether public or private school employees covered should be limited to those employed by "an institution of higher education" or whether they should include persons employed by "an elementary or secondary school."[10] The

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inter alia, extension of the Fair Labor Standards Act to an additional 4½ million workers. H. R. 8260, introduced by Mr. Roosevelt, also would have extended coverage of the Act. Neither bill purported to be applicable to state employees. While hearings on both bills were being conducted by the House Committee on Education and Labor, to which they had been referred, Mr. Roosevelt introduced another bill, H. R. 10518. This new bill extended coverage to certain employees of public and private hospitals and institutions of higher education regardless of whether public or private, profit or non-profit.

H. R. 10518 was referred to the Committee on Education and Labor which, on August 25, 1965, reported the bill favorably, without amendment, and recommended that it be passed. House Rpt. No. 871, 89th Cong., 1st Sess. H. R. 10518 was then committed to the Committee of the Whole House on the State of the Union and no further action was taken thereon. Cong. Quart. Almanac, 1965, Vol. 21, p. 861.

[8] See, n. 6, *supra*.

[9] The bill as originally introduced would have also extended coverage to employees of a "street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (*regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit*) * * *." (Emphasis supplied.)

[10] As introduced, the bill did not apply to employees of elementary and secondary schools, although it did apply to employees of insti-

question was resolved by extending coverage to employees of elementary and secondary schools, as well as institutions of higher learning, subject, again, to the exemptions contained in § 13 of the Act, as also amended by the 1966 Amendments.

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tutions of higher learning, whether public or private. After the House Education and Labor Committee reported the bill favorably, with amendments, the House resolved itself into the Committee of the Whole House on the State of the Union. At this point in the legislative process, Mr. Collier, of Illinois, offered an amendment to extend coverage to employees of elementary and secondary schools. The amendment was adopted and the bill passed the House as so amended. He made the following statement about the rationale of his amendment, viz.,

"(Mr. Collier) Mr. Chairman, these amendments are simple and sound and essential amendments. I do not believe that any member of this body who believes in the principle and purpose of the bill before us today can oppose them.

"What we have done here, if Members will review with me the language of the definition of 'enterprise,' is to say that in sum and substance the employee who works as a dishwasher in a home for the sick or the aged or mentally ill, or one who works as a dishwasher in a college or university cafeteria, or one who works as a dishwasher, for example, in a mental institution, is covered under this bill. Yet, the same employee working as a dishwasher in an elementary or high school cafeteria is not covered.

"*All I want to do is to establish equity in application of the bill.* Let me tell why. I believe I can best explain it by giving an example. This is an actual case.

"In a suburban area of one of our southern States, school officials were recently notified that poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years — in fact, one was a widow — drawing 85 cents an hour for working in the school cafeteria. Yet, children were handpicked and given $1.25 an hour to wash blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage.

"(Mr. Pucinski) Mr. Chairman, will the gentleman yield?

"(Mr. Collier) I yield to the gentleman from Illinois.

"(Mr. Pucinski) Mr. Chairman, if I understand this amendment correctly, it will establish a different fair labor standard provision

The plaintiff States attack the constitutionality of the 1966 Amendments on the ground that the activities of the States and various school districts in the operation of schools, hospitals and related institutions are not commerce,[11] that the "enterprise" concept embodied in the Act by amendments adopted in 1961 is unconstitutional, and that the 1966 Amendments unconstitutionally impugn state sovereignty.[12]

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for people presently employed in elementary and secondary schools and universities.

"(Mr. Collier) That is exactly correct. *I do not want any inequities such as we have been talking about today. We are moving to achieve equity which means treating everyone alike.*" (Emphasis supplied.) 112 Congressional Record (May 25, 1966), pp. 10820-10821.

The Senate Committee on Labor and Public Welfare reported the bill favorably, with an amendment to *exclude* employees of elementary and secondary schools, and this amendment was adopted. Senate Report No. 1487, August 23, 1966, 2 U.S.C. Congressional and Administrative News (89th Congress — Second Session, 1966), p. 3002. The Senate Committee, however, did not undertake to exclude any other public employees from coverage under the Act. The excluded coverage was subsequently restored by the Conference Committee appointed to iron out differences between the House and Senate versions of the legislation. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News, *supra*, p. 3047. It was with an extension of coverage to employees of elementary and secondary schools that H. R. 13712 was finally enacted and signed into law.

[11] Texas words this point as follows: "A state in the performance of the functions of its sovereignty is not engaged in commerce within the meaning of the commerce clause of the constitution of the United States."

[12] Maryland also advances an argument based upon the Eleventh Amendment and its asserted conflict with the provision of the Fair Labor Standards Act which permits an employee not paid in accordance with the minimum wage or overtime provisions of the Act to bring suit if such suit is not brought by the Secretary. 29 U.S.C.A. §216. This argument is beyond the scope of this consolidated proceeding and will not be further considered at this time. It may be made if and when the basic validity of the 1966 Amendments is established and some State employee attempts to sue his employer. Of course, when the argument is advanced and if it is found valid, due regard will be given to the other enforcement provisions con-

I conclude, for the reasons hereafter stated, that all three of these contentions should be resolved against the plaintiffs, that to the extent of the scope of this proceeding the 1966 Amendments should be declared valid and constitutional, and that injunctive relief should be denied.

Commerce Power

Maryland and Texas argue that the activities of a State do not constitute "commerce" which may be regulated under the exclusive power vested in Congress to regulate interstate and foreign commerce. Maryland argues more specifically that, with respect to the operation of public schools, the State's activity has three attributes which remove it from any legitimate definition of commerce, i. e., the activity is non-profit, it is purely governmental, and there is no non-governmental system to compete with or substitute for it.

At the outset, it is well to note that these arguments are based upon a more restrictive premise than the decided cases will support. *United States v. Darby, supra,* upholding the constitutionality of the Fair Labor Standards Act generally, is only one of many decisions which holds that the power of Congress over interstate commerce includes not only that which in itself is interstate commerce but also "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it, as to make the regulation of them appropriate

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tained in 29 U.S.C.A. §216 and the separability language in 29 U.S.C.A. §219.

Maryland and Texas also argue that their schools and hospitals are the "ultimate consumers" of commodities purchased from out-of-state, that such commodities are not "goods" as defined by 29 U.S.C.A. §203(i) and, as a consequence, the Fair Labor Standards Act is not applicable to them. This argument is one of statutory construction, not of constitutional significance, and is also one beyond the scope of this proceeding. It should be asserted in a suit in which the application of the Act to a particular school or hospital is brought into question, so that after full development of the facts, it may be determined if that particular enterprise meets the statutory tests for coverage.

means to the attainment of a legitimate end." *Id.*, at p. 118. See also, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964). Among the decided cases, the most extreme example of the reach of the commerce power of Congress to regulate local activity is *Wickard v. Filburn*, 317 U.S. 11 (1942), where a farmer's consumption of wheat raised on his own farm was held within the reach of Congress to regulate under the commerce clause because that consumption, and its counterpart on other farms, exerted a substantial economic effect on interstate commerce.

Thus, the proper inquiry is not limited to a consideration of whether the activities of the States in operating public schools, schools of higher education or hospitals, are "commerce" as such. The proper inquiry is much broader. It is whether such activities are commerce or affect commerce, even though local in nature, and hence within the power of Congress to regulate commerce.

Maryland's claims that public schools are non-profit, purely governmental and not in direct competition with non-governmental systems are not shibboleths to determine what is and what is not commerce. "Commerce" is not confined to "business" activity in a conventional sense; it includes non-business and non-profit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise. *Powell v. U. S. Cartridge Co.*, 339 U.S. 497 (1950); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959); *United States v. Ohio*, 385 U.S. 9 (1966); *Wirtz v. R. E. Lee Electric Company*, 339 F. 2d 686 (4 Cir. 1964); *Mitchell v. Owen*, 292 F. 2d 71 (6 Cir. 1961); *Goldberg v. Nolla, Galib & Cia.*, 291 F. 2d 371 (1 Cir. 1961), *cert. den.*, 368 U.S. 900 (1961); *N.L.R.B. v. Central Disp. & E. Hosp.*, 145 F. 2d 852 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 847 (1945).[13] In *Public Building Authority of Birmingham v.*

[13] Pertinent also are the following authorities which have held to be "commerce," *non-commercial* interstate transportation of persons and chattels; *Edwards v. California*, 314 U.S. 160 (1941)

Goldberg, 298 F. 2d 367, 370 (5 Cir. 1962), the Court, in holding that federal employees engaged in processing claims for the payment of social security benefits and preparing government checks for beneficiaries were producing goods for commerce, summarized prior holdings by declaring that "there need be no private parties or profit motive present to constitute commerce." It will be noted that this was said in a case in which all of the factors urged by Maryland to render her activities not within the commerce power of Congress were present: the activity was governmental, non-profit, and could not be performed by private enterprise.

The fact is that under the stipulations before us there is abundant evidence that the States, in the performance of the functions where certain employees are covered by the Act, as amended by the 1966 Amendments, are not only engaging in commerce, or in the production of goods for commerce, but are engaging in activities, local in nature, which have a substantial effect on commerce. A brief recital of some of the stipulations between the parties is sufficient to demonstrate.

In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. Expenditures of this magnitude are bound to have an enormous impact on interstate commerce.

For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies

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(movement of indigent persons across state lines); *Thornton v. United States*, 271 U.S. 414 (1926) (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U. S. 470 (1917) (transportation of women across state lines for non-commercial immoral purposes); *Brooks v. United States*, 267 U.S. 432 (1925) (transportation of stolen articles); *United States v. Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). As a latest expression of the state of the law, *Heart of Atlanta Motel, Inc. v. United States, supra*, at pp. 256-257, declares: "Nor does it make any difference whether the transportation is commercial in character."

and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the non-diffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few producers, of text books, science equipment and physical education equipment.

Not only do public schools and hospitals give rise to a large interstate flow of supplies and equipment, having a correspondingly substantial effect upon interstate commerce, public schools and hospitals are directly engaged in commerce and the production of goods for commerce by virtue of federal aid to education and health, involving billions of dollars. Over $4 billion is spent each year in federal grants, of which over $2 billion goes for elementary

and secondary public education, 50% of which is granted directly to local school districts under programs requiring extensive communications between local schools and regional and national facilities of the United States Office of Education. In the area of health services, federal expenditures during fiscal year 1965 amounted to $5 billion, while State and local government expenditures amounted to $4.9 billion. Included in the total of federal expenditures, are annual federal assistance of $260 million for the construction and enlargement of hospitals and other health facilities, annual medical research grants of over $600 million, and public health grants of $65 million to support State and local health agencies, both in operating costs and in programs for the control of disease. Additionally, the Social Security Administration during fiscal 1967 will pay out $2.35 billion for hospital services under the Medicare program, in which 94% of the hospitals in the country, both public and private, currently participate. Another 1 billion will be spent for direct reimbursement to hospitals and physicians for services to eligible patients. These programs create a regular interstate flow of funds to participating hospitals, extensive interstate communication and preparation of materials for interstate transmission by both local hospitals and state agencies, including engineering and architectural plans for hospital construction and enlargement, research data and reports, medical benefits claims, and numerous other types of reports and records.

"Ideas, wishes, orders and intelligence" are "subjects of commerce," *Western Union v. Lenroot,* 323 U.S. 490, 502-503 (1945), and the preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce. *Beneficial Finance Co. v. Wirtz,* 346 F. 2d 340 (7 Cir. 1965); *Willmark Service System, Inc. v. Wirtz,* 317 F. 2d 486 (8 Cir. 1963), *cert. den.,* 375 U.S. 897 (1963); *Public Building Authority of Birmingham v. Goldberg,* 298 F. 2d 307 (5 Cir. 1962); *Mitchell v. Kroger Company,* 248 F. 2d 935 (8 Cir. 1957); *Aetna Finance Co. v. Mitchell,* 247 F. 2d 190 (1 Cir. 1957). Thus, from these activities, as well as the

out-of-state purchases and the receipt of interstate shipments which are either stipulated or inescapably must be inferred from the facts stated, the conclusion is inevitable that the activities of the states are "*in*" commerce, constitute the production of goods for commerce, or substantially affect commerce, although local in nature. Leaving aside for the moment the question of state sovereignty, I conclude that these activities are clearly within the power of Congress to regulate commerce.

The Enterprise Concept

The only authorities to pass on the constitutionality of the enterprise concept, *Wirtz v. Edisto Farms Dairy,* 242 F.S. 1 (D. S.C. 1965), and *Goldberg v. Ed's Shopworth Supermarket,* 214 F.S. 781 (W.D. La. 1963), have both sustained its validity. From my examination of the pertinent authorities, I am in accord with the result reached in those decisions and conclude that the enterprise concept embodied in the Fair Labor Standards Act in 1961, 29 U.S.C.A. § 203(r), represents a constitutionally valid exercise of the power of Congress to regulate commerce.

As I have recited, prior to 1961 the Fair Labor Standards Act applied only to those employees who themselves engaged in commerce or in the production of goods for commerce. By the provisions of the 1961 Amendments, *all* employees of various enterprises whose activities related to the movement of goods in commerce, including those engaged in selling, distributing or using goods that had previously moved in commerce became subject to the Act, subject, of course, to the exemptions contained in § 13 of the Act, 29 U.S.C.A. § 213.[14]

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[14] The 1961 extension of the Act's coverage had the effect of adding over four million workers to the twenty-four million previously within the Act's protection. This extension of coverage was the result of deliberate and lengthy consideration by at least two Congresses. (Senate Report No. 145, 87th Congress, First Session, pp. 2, 10; House Report No. 75, 87th Congress, First Session, pp. 2, 7). Exercise of the power to extend coverage was based upon the conclusion, discussed in detail in the Committee Reports of both the Senate and the House, that the additional coverage was necessary

Translated into a concrete example, the enterprise concept, as amended by the 1966 Amendments, means that in a private or public hospital the nurse's aid or maintenance worker, even though not engaged in commerce or in the production of goods for commerce, is subject to the minimum wage and overtime provisions of the Act if some employee of the hospital is engaged in commerce or in the production of goods for commerce, or handling goods in commerce. That Congress may constitutionally so extend coverage seems clear from the decided cases, of which Congress was fully aware when it first adopted the enterprise concept in 1961.[15] Indeed, it may properly be concluded that in adopting the enterprise concept Congress did not exercise to the limit its full power to regulate commerce, because application of the enterprise concept is conditioned upon the presence of some employee directly engaging in commerce, producing goods for commerce or handling goods in commerce. From the authorities it may be concluded that the enterprise concept could have been conditioned upon some employee engaging in local activity "affecting commerce" short of the actual interstate activity previously mentioned.[16]

One of the leading authorities pointing to the conclusions just stated is *Labor Board v. Reliance Fuel Corp.*, 371 U.S. 224 (1963), in which the National Labor Relations Board's jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local where the retailer obtained the oil from a wholesaler who imported it from another state, was upheld. The conclusion resulted from the Court's construction of the

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to accomplish the Act's original purposes and was within the scope of the federal commerce power as evidenced by existing precedents under the National Labor Relations Act and other regulatory statutes.

[15] See e.g., Senate Report No. 145, April 10, 1961, 87th Congress First Session, 2 U.S. Code and Adm. News (87th Cong., 1st Sess., 1961), pp. 1622-1623.

[16] In this regard, the authorities cited in footnote 2, *supra*, all of which were decided prior to the 1961 Amendments are pertinent. They clearly indicate that prior to 1961, there were interstices in the Act which Congress could constitutionally fill. As pointed out in the text, they were only partially filled in 1961.

National Labor Relations Act to vest in the Board "* * * the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*Id.*, at p. 226), and the citation of *Wickard v. Filburn, supra,* to support the conclusion that the distributor's activities affected commerce and were within the constitutional reach of Congress to regulate. Reference was also made to *Polish Nat. Alliance v. N.L.R.B.*, 322 U.S. 643 (1944), for the proposition that in enacting the National Labor Relations Act "* * * Congress had explicitly regulated not merely transactions or goods in interstate commerce, but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Id.*, at p. 648.

Similarly, in *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Bldg. Trades Council v. Kinard Const. Co.*, 346 U.S. 993 (1954); and *Plumbers Union v. Door County*, 359 U.S. 354 (1959), the use of materials from out-of-state provided the basis for National Labor Relations Board jurisdiction with respect to the construction, respectively, of an office building, a court house and a housing project. See also, *San Diego Unions v. Garmon*, 353 U.S. 26 (1957); *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957). See also, *Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482 (1953).

If the National Labor Relations Board may regulate the acts of the employer toward each employee of the fuel oil retail distributor and every construction worker on a building project without regard to whether that employee is directly engaged in interstate commerce simply because some goods are bought by the company out-of-state, it cannot be doubted that the nurse's aid or hospital maintenance worker likewise may be brought under the coverage of the Fair Labor Standards Act when someone employed by the hospital purchases drugs and equipment out-of-state, or purchases from local sources drugs and equipment which were produced out-of-state, or handles drugs and equipment originating from out-of-state, or the hospital engages in commerce in administering and carrying out a federal health grant or the program of Medicare, even

though the nurse's aid or maintenance worker himself does not carry on such activities. The same is true in regard to employees of schools, elementary, secondary, or institutions of higher learning, and specialized hospitals engaged in treatment of the mentally ill, those suffering from contagious diseases, the aged, or the handicapped.

It is a matter of elementary logic that the hospital and the school function as a result of the sum of all of the activities of all of their employees. The hospital administrator or the superintendent of education (himself exempt from the provisions of the Act), or his secretary, or some other employees, would have no occasion to engage in commerce, or the production of goods in commerce, if the services of the employees covered by the Act under the 1966 Amendments were permanently withdrawn. Their services are essential to the operation of the hospital or the school and, hence, their activities, although local in nature, substantially affect commerce, so that Congress may regulate the minimum wages to be paid them as well as the maximum hours they may be required to work without payment of overtime.

State Sovereignty

The precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court, because Congress has not heretofore attempted to regulate minimum wages and maximum hours (without overtime) for state employees. But from what has been decided in numerous other contexts analogous to the case at bar, and from the basis of those decisions, I can only conclude that the 1966 Amendments are valid and constitutional in their entirety. I have already referred to the cases in which the full extent of the power of Congress generally to regulate commerce has been developed. In every instance in which the exercise of this power has been applied to some state activity, the validity of the exercise has been upheld in language and on reasoning which, I am satisfied, sustains the validity of the 1966 Amendments. Because it on this aspect of the case that the States most vigorously attack the

validity of the 1966 Amendments, I am constrained to discuss these authorities fully.

Since the States are most vociferous in conjuring up the possible "horribles" of an adverse adjudication to them,[17] it is necessary, at the outset, to define what is — and what is not — presently before us. Before me is only the question of whether Congress may prescribe minimum wages and overtime for non-executive, non-professional and non-administrative employees of private and public hospitals, schools and related institutions. Congress has singled out this group which, experience has proved, is often underpaid and subjected to unreasonable work schedules and has required that its members be paid a minimum sum which, measured by the standards of contemporary society, is deemed a decent wage and that they not be compelled to work longer hours in a work period without payment of overtime than, by those standards, are deemed proper. These standards have been made applicable to private and public employees, alike. Congress has *not* sought to cover doctors, nurses, principals, teachers, research assistants, or the like. Nor has Congress sought to cover the governors, attorneys general, legislators, judges or policemen, who, some of the States assert, could eventually be covered if we upheld the validity of the 1966 Amendments.

Our consideration of the constitutional issue presented here cannot deal with hypothetical projections by the States of regulations yet to come. Our consideration of the States' contention that their sovereignty is impaired, and my conclusion that the 1966 Amendments are valid and constitutional, are limited to the 1966 Amendments and only those employees to which they extend, as are my previous conclusions that the power to regulate under the commerce clause exists and that the enterprise concept is constitutional. No court, and in particular no lower federal court, should attempt to adjudicate that which is not justiciable; all must steadfastly follow the rules set down by the Supreme Court governing the process of constitutional adjudication:

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[17] See *New York v. United States*, 326 U.S. 572, 583-584 (1946).

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed. 60, 73, 74. *This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.* In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' * * * Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * * In Barrows v. Jackson, 346 US 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id. 346 U.S. at 256. *The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.*" (emphasis supplied; footnote eliminated) *United States v. Raines*, 362 U.S. 17, 20-22 (1960).[18]

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[18] Although one of the best expressions of judicial self-restraint in the process of constitutional adjudication, *United States v. Raines, supra,* does not stand alone. It is only one of a line of decisions

As a first step in the decision of the limited question before me, it is necessary to put to rest any argument based upon the Tenth Amendment, as such. The Tenth Amendment is but a "truism" — "that all is retained which has not been surrendered." *United States v. Darby, supra,* at p. 124. Besides stating this self-executing formula, the decided cases are clear that the Tenth Amendment neither adds to nor detracts from the essential question to be decided in this case. *United States v. Sprague,* 282 U.S. 716, 733-734 (1931); *United States v. Appalachian Electric Power Company,* 311 U.S. 377, 428 (1940); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 534 (1941); *Fernandez v. Wiener,* 326 U.S. 340, 362 (1945); *Case v. Bowles,* 327 U.S. 92, 101-103 (1946); *United States v. Oregon,* 366 U.S. 643, 649 (1961).

I turn directly to the cases where federal regulation under the Commerce Clause has been upheld, even when applied to an "essential" state activity. The principal authorities which must be considered are *Sanitary District v. United States,* 266 U.S. 405 (1925); *Board of Trustees v. United States,* 289 U.S. 48 (1933); *Case v. Bowles,* 327 U.S. 92 (1946); and the four related cases of *United States v. California,* 297 U.S. 175 (1936); *California v. United States,* 320 U.S. 577 (1944); *California v. Taylor,* 353 U.S. 553 (1957); and *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184 (1964). Also of interest, because it posed an issue of state sovereignty dispositive of this litigation, is *United States v. Ohio,* 385 U.S. 9 (1966).

The oldest and one of the most important cases is the *Sanitary District* case. This was a suit by the Attorney

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developing the concept which it so eloquently states: *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (concurring opinion, Brandeis, J.); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States v. Spector,* 343 U.S. 169 (1952); *International L. & W. Union v. Boyd,* 347 U.S. 222 (1954). Additional authorities are cited in the portion of the opinion in *United States v. Raines, supra,* from which the quotation is extracted.

General of the United States to enjoin the Sanitary District of Chicago from diverting a volume of water from Lake Michigan in excess of that allowed by federal statute, although a state statute set a higher limit. The federal government asserted the taking to conflict with the power of Congress to regulate interstate and foreign commerce, and with a treaty with Great Britian concerning boundary waters of the Dominion of Canada; the Sanitary District defended on the grounds, *inter alia*, that public health required the taking of the additional quantity of water in accordance with the state statute, because otherwise it would be impossible to carry the city's sewage downstream.

Mr. Justice Holmes, speaking for a unanimous Court, held that the injunction should issue. He declared, basing the right to relief on the power of the federal government to regulate interstate and foreign commerce:

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants.* In matters where the states may act, the action of Congress overrides what they have done." (Emphasis supplied.) *Id.*, at p. 426.

Following this he recited the evidence in detail, including that which clearly showed the sanitary needs of Chicago for the additional water, and concluded the opinion by stating:

> "* * * a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the city of Chicago will be subjected if the decree is carried out are exaggerated; but, *in any event, we are not at liberty to consider them here as against the edict of a paramount power.*" (Emphasis supplied.) *Id.*, at p. 432.

Maryland argues that Chicago did not need the water for an "essential state function," but I conclude it difficult

to think of something more essentially sovereign or necessary to the welfare of the State and its people than sewage disposal; sewage disposal is as much a part of public health as hospitals for contagious diseases, and hospitals for the mentally ill. Yet, the Court stated in this context that when Congress exercised its power over interstate and foreign commerce, the welfare or needs of the inhabitants of the State *could not even be considered.* Maryland also argues that the case is distinguishable because it concerned a direct burden on commerce. The answer is that Congress has found that substandard wages and non-payment of overtime are also burdens on commerce and this finding has been judicially approved. *United States v. Darby, supra.*

Board of Trustees v. United States, supra, was a case in which the alleged conflict between the exercise of the power of Congress to regulate commerce and the concept of state sovereignty arose where the State was exercising its sovereignty to provide higher education. The University of Illinois imported scientific apparatus for use in one of its educational departments, and it sued to obtain a refund of duties exacted on the importations. For a unanimous Court, Chief Justice Hughes held that the power of the federal government over goods moving in foreign commerce is plenary, that the State in the performance of state functions might not limit the exercise by Congress of its power, and that the duties were properly laid.

In arriving at this result, the Court recognized that the federal government has the power to tax, including the power to lay duties, and that it has the power to regulate commerce. The existence of the taxing power was stated not to foreclose Congress from laying duties in the exercise of its power to regulate commerce, and the Court concluded that the duties in question were laid in the exercise of the power to regulate commerce and not in the exercise of the taxing power. Having reached that conclusion, the Court then dealt with the argument that in the exercise of the commerce power, Congress was limited by notions of state sovereignty as it was when it exercised its taxing power:

"The principle invoked by the petitioner, of the immunity of state instrumentalities from Federal Taxation, has its inherent limitations. * * * It is a principle implied from the necessity of maintaining our dual system of government. * * * Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. *In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted.* To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. *It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.*" (Emphasis supplied.) *Id.*, at p. 59.

Significant also for the case at bar, is the earlier statement of the Court in which it described the power of Congress over interstate and foreign commerce:

"It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. * * *.

"* * * *The principle of duality in our system of government does not touch the authority of the Congress in*

the regulation of foreign commerce." (Emphasis supplied.) *Id.*, at pp. 56-57.

Maryland seeks to escape the language in this opinion by the apparent argument that the case involved Congress' power over foreign commerce and the express argument that the power of Congress over commerce would not be limited if recognition were given to state sovereignty over public schools and hospitals. Of course, the Court was writing in the field of foreign commerce, but the power of Congress over foreign commerce is no more plenary and no more exclusive than its power over commerce between the states, the latter including the power to regulate local activities which have a substantial effect on interstate commerce. *Wickard v. Filburn, supra.* The States lack any power to regulate commerce as such; it follows that there can be no interference with state sovereignty over interstate commerce because none exists. Where Congress had extended the Act to certain employees of public schools and hospitals, to hold that Congress may not validly do so necessarily limits the power of Congress. The opinion's specific and peremptory rejection of the assertion that "state functions" can isolate a state or its instrumentalities from federal regulation surely goes a long way to support the validity of the 1966 Amendments. The specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case.

Case v. Bowles, supra, only repeats the clear implications of the *Sanitary District* and *Board of Trustees* cases. In *Case*, a suit for injunction was brought to restrain the State of Washington from selling timber on school lands at prices in excess of those fixed by regulation adopted under the Emergency Price Control Act. The State alleged, in defense of the action, that price controls could not be applied to it because the sale was "for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens." *Id.*, at p. 101.

This argument was rejected and price controls held applicable to the State in the following language:

"We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. *The contention rest on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'* It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. * * * Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business 'having the incidents of similar enterprises usually prosecuted for private gain.' * * * But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, *the petitioner's argument is that the extent of the power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.*" (footnote eliminated; emphasis supplied.) *Id.*, at p. 101.

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"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article

> VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *.'" (footnote eliminated) *Id.*, at pp. 102-103.

Case v. Bowles may not be summarily rejected, as it is by Maryland, on the ground that "the real sovereignty of the State was not infringed" and the case arose under the war power of Congress. The power of Congress to regulate commerce is no less plenary and no less exclusive than the power to make war under which the Emergency Price Control Act was adopted. While price limitation on the sale of timber to support public education, in degree, might be less discommoding than fixing wages of certain state employees, the Court's rejection of the "essential" functions argument is of extreme significance; the rejection goes to the very heart of this case.

The line of cases beginning with *United States v. California, supra,* may appear to be distinguishable from the instant case on the ground that each involved state activities which do not fall within the concept of essential governmental functions. Yet the essential nature of the state activity and the sovereignty of the state was interposed as a defense in each of them and rejected by the Court, not on the ground that the activity was not essential but on the ground that the "essential" concept was not a good defense. Thus, the cases are additional authority for concluding that the States' argument here is lacking in merit.

In *United States v. California* the question was whether a terminal railroad owned and operated by a State for the purpose of facilitating the commerce of a port, all of the revenues of which were used to improve port facilities, could be subjected to the Federal Safety Appliance Act, so that the penalty prescribed by that Act for its violation could be recovered from the State of California.[19]

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[19] It is interesting that in an earlier suit, *Sherman v. United States,* 282 U.S. 25 (1930), involving the same belt railroad, Mr. Justice

California urged these activities were not subject to the Act because "* * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.*, at p. 183. Mr. Justice Stone (later Chief Justice), speaking for a unanimous Court, specifically rejected this argument and sustained the imposition of the penalty, stating:

> " * * * we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railway it is acting within a power reserved to the states cannot be doubted. * * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * * In each case the power of the state is subordinate to the constitutional exercise of the granted federal power." *Id.*, at pp. 183-184.

In addition to announcing the absolute supremacy of the power of Congress to exercise its authority to regulate commerce despite the defense of state sovereignty, the Court rejected an argument that the commerce power is circumscribed by state sovereignty, as is the taxing power. It said:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is

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Holmes said: "California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor — a state prerogative." *Id.*, at p. 29.

> implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" (Emphasis supplied.) *Id.*, at pp. 184-185.

In *California v. United States, supra,* an order of the United States Maritime Commission requiring elimination of preferential and unreasonable practices, i.e., excessive free time and non-compensatory charges for services, was held enforceable against the State of California and the Board of State Harbor Commissioners for San Francisco Harbor. California defended its non-compliance with the order on the ground that the Act under which it was issued had no application to public owners or wharves and piers. This question of statutory construction was decided against its contention, with the Court adding:

> "* * * it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *Id.*, at p. 586.

The belt railway which was the subject of litigation in *United States v. California, supra,* was also the subject of litigation in *California v. Taylor, supra.* In the latter the

question was whether the Railway Labor Act was applicable to the *employer-employee relationship* between the State of California and its employees engaged in operating the railroad. Notwithstanding that California provided that its employees had no right to bargain collectively with it concerning terms and conditions of employment, the Railway Labor Act was held applicable on the principle that a state may not prohibit the exercise of rights which the federal labor relations acts protect. As in the earlier cases, California asserted the Act, if held to apply to it, invalidly interfered with its sovereign immunity, but the Court rejected this contention, saying:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (U.S.) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' 297 U.S., at 184. 'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships." *Id.*, at p. 568.

A similar result was reached in *Parden v. Terminal R. of Alabama Docks Dept., supra,* where Alabama's plea of sovereign immunity was rejected in a suit brought against it under the Federal Employer's Liability Act by an employee of a railroad which it owned and operated. The decision proceeded on the dual grounds that when Congress was empowered to regulate commerce, the States neces-

sarily lost any portion of their sovereignty that would stand in the way, and that Alabama waived its protection against suit by an individual, as embodied in the Eleventh Amendment, by operating an interstate railroad approximately twenty years after enactment of the Federal Employers' Liability Act.[20]

In *United States v. Ohio, supra,* the question was whether the State of Ohio was liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally-imposed acreage allotments. Specifically, the wheat was grown on a prison farm as part of a program of individual therapy and rehabilitation. It was consumed exclusively on the farm; indeed, by the Ohio Constitution it could neither be "sold, farmed out, contracted or given away." The Sixth Circuit Court of Appeals held that the growing of wheat and consumption of the crop by the inmates of the institution could not have any substantial effect on interstate commerce and, hence, that the Act was inapplicable. 354 F. 2d 549 (1965). The judgment was summarily reversed in a *per curiam* opinion on the authority of *Wickard v. Filburn, supra.*

The *Ohio* case had present all of the factors relied on here by the States to invalidate the 1966 Amendments.

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[20] Three decisions of United States Courts of Appeals in this area are worthy of note. *United States v. Feaster,* 330 F. 2d 671 (5 Cir. 1964), held that the National Mediation Board, acting under the Railway Labor Act, could require the state agency which operated state-owned dock facilities to produce its employment records for inspection by a union. In *State of Colorado v. United States,* 219 F. 2d 474 (10 Cir. 1954), it was held that Colorado State Board of Stock Inspection was subject to the registration requirements of the Packers and Stockyards Act, and to the payment of penalties under the Act, "the same as are private persons or agencies," notwithstanding that inspection was conducted "in its sovereign capacity as a state." *Id.,* at p. 477. The most recent decision in this regard is *N.L.R.B. v. Local 254, Building Service Employees International Union,* ___ F. 2d ___ (1 Cir. 4/10/67), holding that for purposes of the National Labor Relations Act the Department of Education of the State of Massachusetts was "a person engaged in commerce" and "an employer" as defined in the Act.

Nothing could be more essential or a more sovereign governmental function than providing places of detention for those convicted of crimes. The performance of such a state function neither produces income nor competes with any private enterprise. Likewise, it is a function which can in no way be provided by private enterprise. The case was decided by the Court of Appeals on the commerce issue without reaching the asserted issue of impairment of state sovereignty and we are advised that in the briefs presented to the Supreme Court the latter contention was not made. While the case is conclusive authority for determination of the scope of the power of Congress to regulate commerce, it is not necessarily determinative on the issue of impairment of state sovereignty.

In asserting boundaries to federal regulation under the Commerce Clause, the States claim support for the result they advocate in *New York v. United States*, 326 U.S. 572 (1946), and other cases which have held the power of Congress to tax is subject to limitation. It should be noted at the outset that in the *New York* case there was no opinion of the Court, and reliance is placed upon one of the opinions concurred in by only four justices. But the weakness of this authority lies not in the lack of unanimity of the Court, but rather in the fact that other decisions before and after *New York* establish that an unqualified analogy between the taxing power and the commerce power cannot be made. Parenthetically, it should also be noted that in *New York* the claim of state sovereignty was rejected and the validity of the tax upheld. The *Sanitary District* case, *supra*, decided in 1925, and *Board of Trustees v. United States*, decided in 1933, clearly imply that Congress's power to regulate commerce and Congress's power to tax are not coterminus. *Case v. Bowles*, decided the same term as, but after, *New York v. United States*, specifically rejects limitations on the war power such as were suggested on the taxing power by dictum in some of the opinions in the *New York* case. On the other hand, when the power of Congress to regulate commerce is being considered, *United States v. California*, decided ten years before the *New York* case, is specific in saying that the test of validity of

regulation under the Commerce Clause is different from the test of the validity of federal taxation touching upon state sovereignty. See also, *United States v. Kahriger*, 345 U.S. 22 (1953).

These cases demonstrate that the taxing power and the commerce power have been viewed by the Supreme Court as having different limitations, because of the concurrent nature of the former, and the plenary nature of the latter. In sharp contrast, stand the statements of the Court that the power of Congress over war and over commerce, both foreign and interstate, are plenary. Because each is plenary, the war and commerce powers of Congress are necessarily coterminus, and *Hopkins Federal Sav. & L. Assn. v. Cleary*, 296 U.S. 315, 343 (1935), so suggests. Thus, cases decided under any of the plenary powers are precedents for similar situations arising under one of the other plenary powers, while cases decided under the taxing power are weak authority for determining the limits of the exercise of a plenary power. While an attempt is made to distinguish *Case v. Bowles* on the grounds that it concerned the war power, and to distinguish the *Board of Trustees* case on the grounds that it concerned the power to regulate foreign commerce, patently, these powers are plenary, coterminus and indistinguishable from the power to regulate interstate commerce. Indeed, while asserting that the cases are distinguishable, the States fail to cite one case holding that these powers are not equally plenary and coterminus; at the same time, the States fail to cite one case holding that the commerce power is restricted to the same area as the taxing power.

Hopkins Federal Sav. & L. Assn. v. Cleary, 296 U.S. 315 (1935), urged on the Court by the States, should also be noticed. In the *Hopkins* case, a federal statute which permitted state building and loan associations to become federal building and loan associations without state consent was held invalid. The Congressional power under which the statute had been adopted was deemed by the Court to be concurrent with a similar state power. As a consequence, the Court, consonant with its approach in taxing cases, where *concurrent* powers were also involved, drew a line

between federal and state sovereignty in holding that the statute unconstitutionally transgressed state sovereignty, but in doing so, it was careful to state: *"We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the Commerce Clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount."* (Emphasis supplied.) *Id.*, at p. 338. Thus, not only does the *Hopkins* case *not* constitute authority for the contention urged by the States, but the care with which the Court delineated the problem before it strongly suggests a contrary result had the legislation been an exercise of the power of Congress to regulate commerce. It is at most additional authority for the result I would reach.

The States, in the stipulations which we earlier mentioned, have presented extensive evidence to show the far-reaching financial impact on them of the 1966 Amendments. The proof tends to show that the graduated financial burden, resulting from escalation of the minimum wage and contraction of maximum hours without payment of overtime over a period of years, will necessitate either increased taxes or a curtailment of essential services. There is before us evidence that current budgetary appropriations will be insufficient to meet the increased costs resulting from the 1966 Amendments during the current fiscal period, and that in many instances, political subdivisions, restricted by organic law to maximum limits of taxation and borrowing, are currently operating at these maxima so that, absent grants-in-aid or an amendment of organic law, they will be required to curtail the amounts spent for teachers, text books and the like, or reduce the number of people served, if they are required to comply with the 1966 Amendments.

As I said earlier, this data is not excluded on evidentiary principles. It is properly before us — if only to put flesh on the skeletal frame of this litigation. But, in the decision of the constitutional issues presented to us, it, and the arguments of unconstitutional impairment of state sovereignty predicated upon it, are largely irrelevant. I have concluded that the 1966 Amendments are valid and constitutional, as is the enterprise concept of the 1961 Amend-

ments, and that there is no unconstitutional impairment of the sovereignty of the plaintiff States. The financial impact of the 1966 Amendments on the States is an argument to be addressed to Congress and not to the courts. As Chief Justice Marshall authoritatively stated in *Gibbons v. Ogden*, 9 Wheat. 1 (1824):

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" (Emphasis supplied.) *Id.*, at p. 197.[21]

Even more specific in stating the principle that the financial impact of the 1966 Amendments is no guide to their validity is *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). In that case, the federal government planned to flood certain lands belonging to Oklahoma. The state sought an injunction, arguing, *inter alia*, that the project as planned would take much land unnecessarily, without serving the purpose of the dam. The Court declared:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and

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[21] The vitality of the principle announced has not been eroded by time. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964); *Polish Alliance v. N.L.R.B.*, 322 U.S. 643, 650 (1944); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-528 (1941); *Sanitary District v. United States*, 266 U.S. 405, 432 (1925).

effectiveness of a particular project. They are, therefore, questions for the Congress not the courts. * * * *Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweighs the costs of the undertaking.*" (Emphasis supplied.) *Id.*, at pp. 527-528.

To a further allegation that tax revenues of Oklahoma would be diminished because of loss of property taxes on the seized land, and the public education might be hampered because certain school buildings, on the condemned land, would have to be rebuilt elsewhere, the Court said:

"*The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power.*". (Emphasis supplied.) *Id.*, at p. 534.[22]

I conclude that defendants' motion for summary judgment should be granted, but in view of the fact that my conclusions are shared only in part by Chief Judge Thomsen, and not at all by Judge Northrop, counsel may present a form of decree declaring the minimum wage provisions of the 1966 Amendments valid and constitutional and denying plaintiffs' prayers for injunctive relief.

HARRISON L. WINTER,
United States Circuit Judge.

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[22] Although not as explicit, several of the authorities discussed in the text support the rule that when the commerce power is exercised the test of validity of the exercise is *not* the cost to the States. In *California v. Taylor, supra,* the State was exposed to payment of the higher wages for state employees arrived at as a result of collective bargaining rather than the scale prescribed by state fiat. The result of the decision in *United States v. Ohio, supra,* would be presumably to increase the state's cost for wheat and flour supplies purchased from the market place rather than grown on the prison farm. In *Case v. Bowles, supra,* price controls on the sale of timber decreased school revenues so that services would have to be reduced or school taxes increased. The penalties exacted in *United States v. Ohio, supra,* and *United States v. California, supra,* represented a diminution of general state revenues otherwise available to support other state activities.

THOMSEN, Chief Judge, concurring in part:

I agree with the conclusion reached by Judge Winter — that the injunction requested by plaintiff should be denied — but for somewhat different reasons and with one important reservation. I agree that the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce, and that use of the "enterprise concept" does not itself render unconstitutional the 1966 Amendments to the Fair Labor Standards Act. The potential Eleventh Amendment problems, suggested by the States, should be considered as they may arise in subsequent actions against the several States. But I cannot agree that the power of the federal government to regulate essential sovereign functions of the States is absolute and unqualified, despite the broad language of the opinions cited by Judge Winter.

When the thirteen sovereign States adopted the Constitution they gave up only part of their severeignty to the United States of America. The system created by the Constitution was and is a federal system; the States are not administrative divisions of a central government. For reasons which were reviewed by Judge Wisdom in *United States v. Manning*, W.D. La., 215 F. Supp. 272 (1963), and are not disputed, the Tenth Amendment was adopted in 1791. To characterize that Amendment as a "truism" does not mean that it was intended to be devoid of meaning, lulling the States into acceptance of a national government which may, without further amendment to the Constitution, take away from the States the substance, if not the trappings, of the sovereignty which they intended to preserve. The Tenth Amendment makes explicit the principle of federalism, which recognizes the supremacy of the federal government with respect to the powers delegated to it, but also recognizes that the States retained certain sovereign powers. The sovereign powers retained by the States are not specified in the Tenth Amendment or in any other provisions of the Constitution; they are limited

only by the scope and thrust of the powers delegated to the federal government.

The power to regulate interstate commerce delegated to the federal government has been held to be "plenary" and has been accorded a very wide range by the Supreme Court. The cases in which the extent of the commerce power has been discussed in relation to the Tenth Amendment fall into two categories: those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State.

In the first category, the pendulum has swung away from decisions[1] which restricted the commerce power. Since 1937 the Supreme Court has consistently held that the federal regulatory power under the commerce clause may control intrastate activities which merely affect commerce.[2]

The cases involving federal regulation of activities engaged in by the States or their subdivisions have been analyzed in Judge Winter's opinion. Some of them involved the competing interests of several States,[3] the treaty power,[4] the power over foreign commerce,[5] or the war power.[6] Others involved the operation by a State of a

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[1] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[2] *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[3] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

[4] *Sanitary District of Chicago v. United States, supra.*

[5] *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48 (1933).

[6] *Case v. Bowles*, 327 U.S. 92 (1946).

railroad,[7] a waterfront terminal[8] or the dominion which the federal government has, "to the exclusion of the states," over navigable waters of the United States.[9] The opinions in some of those cases state the power of the federal government over interstate commerce in broad and unqualified terms, indicating that when Congress exercises its power over interstate commerce, the welfare or needs of the States need not even be considered. The broad language of the opinions must, however, be read in the context of the cases in which they were rendered. In none of those cases were the essential taxing and budgetary functions of the States so seriously affected as they are by the statute under consideration. We must heed the admonition in *Gomillion v. Lightfoot*, 364 U.S. 339, at 343-344: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

The question remains: Does the principle of federalism, implicit in the Constitution as originally drawn, and made explicit by the Tenth Amendment, prevent Congress from regulating, in the manner provided by the 1966 Amendments, the operation of public schools and hospitals by the States and their subdivisions?

The States cite a number of cases arising under the taxing power, to the effect that the taxing power is subject to limitations imposed by the principle of federalism, and argue that similar limitations apply to the commerce power. Limitations on the taxing power have been recognized when the exercise of that power would unduly inter-

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[7] *United States v. California*, 297 U.S. 175 (1936); *California v. Taylor*, 353 U.S. 553 (1957); see also *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964).

[8] *California v. United States*, 320 U.S. 577 (1944).

[9] *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

fere with the governmental activities of the States.[10] "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system." *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575 (1931).[11] The States argue that the reach of the commerce power is no greater than the reach of the taxing power, citing a statement from one of the opinions in *New York v. United States*, 326 U.S. 572, 582 (1946): "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." It must be recognized, however, that a limitation has been placed upon the taxing power which has not yet been placed upon the commerce power.

In another opinion in *New York v. United States*, Chief Justice Stone, concurring for himself and three other Justices, stated:

> "* * * we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike. * * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. * * *" 326 U.S. at 586-587.
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> "The problem is not one to be solved by a fomula, but we may look to the structure of the Constitution as our guide to decision. * * *" 326 U.S. at 589.

The limitation on the taxing power — undue interference with a State's performance of its sovereign functions of government — responds to Chief Justice Marshall's famous dictum: "The power to tax involves the power to destroy". *McCulloch v. Maryland*, 4 Wheat. 316, 431

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[10] *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477, 478 (1939).

[11] See also *New York v. United States*, 326 U.S. 572, 577 (1946); *Willcuts v. Bunn*, 282 U.S. 216 (1931).

(1819). The potentially destructive power of taxation lies in the ability of one sovereign to impose an economic burden upon the functions of the other too great to be borne, thereby curtailing or eliminating a particular activity.

Taxation is not the only way in which the federal government may destroy or cripple essential State functions. There must be some limit beyond which the federal government cannot go in its attempt to exercise against the States themselves the power of the federal government over interstate commerce. Neither the Solicitor of Labor, who argued the case for all the defendants, nor Judge Winter in his opinion, denies that there may be some limit, but they argue and hold respectively that whatever limit there may be has not been exceeded in this case.

The proper limit is indicated, though not fixed, by the statement of Chief Justice Stone, quoted above, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign *and indispensable* functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government.

When the federal government invokes the commerce power, unaided by the Fourteenth Amendment or any other constitutional provision, to regulate the relations between a State and state employees who are not themselves engaged in interstate commerce or in the production of goods for commerce, the Court should consider a number of factors in determining the constitutionality of the proposed regulation. The Court should give weight and deference to any congressional findings with regard to the effect which the action sought to be regulated has on interstate commerce. The Court should also consider whether

the activity subject to the proposed regulation is an important function of the State and its political subdivisions; whether the service in question is offered or might be offered to the same extent and on substantially the same terms by private enterprise or other non-state sources; and whether such regulation would seriously interfere with the State's performance or regulation of its indispensable sovereign functions.

The statute enacting the 1966 Amendments contains no congressional findings with respect to the relationship between interstate commerce and the proposed coverage of state employees.[12]

The operation of public schools and hospitals is undoubtedly one of the most important functions of State governments. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated flatly: "Today, education is perhaps the most important function of state and local governments." The importance of public hospitals to the community is also beyond dispute.

Public hospitals in many instances provide service otherwise unavailable.[13] The public schools and hospitals could

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[12] Findings with respect to labor conditions in industries engaged in commerce or in the production of goods for commerce, were included in the original Fair Labor Standards Act, see 29 U.S.C.A. 20,2(a).

[13] In Maryland 867 beds, all publicly owned and operated, constitute the total facilities for tubercular care in the State of Maryland. A similar situation exists in Texas. Under Texas law, on the discovery of tuberculosis the patient can be committed to a state hospital until the disease is no longer communicable. But non-state hospital beds for tubercular patients are virtually non-existent and the few that are available are extremely expensive. Similarly, approximately 90% of the facilities for the mentally disturbed and mentally retarded in Maryland are provided by the State, and, undoubtedly, much the same proportion applies in other States. Moreover, it is the public hospital which bears the main burden of providing care for the indigent. In Texas, for example, most of the people in State mental institutions are charity or near charity patients. In the Texas tubercular hospitals only nine out of 2,900 patients paid for the complete cost of their hospital care in 1966. The necessity of keeping

not be replaced by nongovernmental enterprises.[14] The alternative would be federal schools and hospitals, and no one has argued for that.

From the mass of evidence submitted to the Court pursuant to stipulation, it is clear that the impact of the 1966 Amendments on the States is far-reaching. The Act imposes upon the States a graduated financial burden, which will necessitate either increased taxes or a curtailment of the services now bing rendered by the States and their political subdivisions. Most of the States must operate out of current funds provided by budgetary appropriations,[15]

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the mentally disturbed and those ill with communicable diseases away from the community at large is too obvious to require elaboration.

[14] In Maryland approximately 80% of the total number of secondary and elementary school students are enrolled in public schools. In Texas and Ohio the comparable figures are approximately 86% and 84% respectively. The great majority of the other schools are either parochial or religiously affiliated. In Maryland public institutions of higher education served 74% of the students enrolled toward degree credit. In Texas and Ohio the comparable figures were 77% and 63% respectively. In 1965 over half the hospital beds in Maryland were located in hospitals operated by State and local governments. It is true, as defendants note, that these hospitals accounted for only 15% of the total admissions, but that figure reflects their role in treating the chronically ill and long-term mental and tubercular patients. In Texas, State hospital beds account for almost half the total number of beds in all Texas hospitals, and for about 25% of the admissions. State and local government hospitals in Ohio provided almost half the total number of hospital beds in the State and accounted for about 15% of the admissions.

[15] Thus, Texas represents to the Court that in order to meet the standards of the Fair Labor Standards Act the expenditures of the Texas Youth Council will be increased by over $3,000,000 annually; the Department of Mental Health and Mental Retardation will need an additional $7,500,000 annually; the cost of the Institutions of Higher Education will go up over $3,250,000 annually and the Fort Worth Independent School District will need by 1971 to find additional tax revenue sources for approximately $575,000 annually. Even though the Fort Worth District is one of the larger districts in the State, there are over 1,300 other Independent School Districts whose cost will be increased proportionately and who also must find additional sources of revenue. Many of these districts have reached their constitutional tax rate limit as well as property value limitations.

and in many instances the responsible political subdivisions, notably school districts, are taxing at their constitutional maximum and would have to curtail the amounts spent for teachers, textbooks and the like, or reduce the number of people served, unless and until the State constitution is amended.

Nevertheless, I cannot say that the minimum wage provisions interfere so *unduly* with the State's performance of their indispensable sovereign functions as to make those provisions unconstitutional. It is of course true, as Judge Northrop points out, that the minimum wage provisions interfere with the budgetary function of the States. But that interference must be weighed against the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage. Serious problems are presented by the possible application of the Act to work done by inmates of correctional and other institutions as part of their education or rehabilitation programs, but I agree with the Solicitor of Labor that these can best be handled by the regulations or on a case by case basis, and do not justify a sweeping injunction.

The overtime provisions present a more serious problem. Unlike the minimum wage provisions, the overtime provisions are not limited to the lowest paid employees. Many State functions, including some which are affected by the 1966 Amendments, require work arrangements other than the standard 40-hour work week. Public school, college and university personnel, who generally receive lengthy vacations, must often work longer than 40 hours per week during some part of the school year. The statute under consideration makes some provision in this regard for the employees of hospitals, whose round-the-clock requirements do not fit comfortably into a 40-hour work week.[16] A common practice has been to give these and other State employees compensatory time, or to make various other budgetary arrangements to keep in fair balance State jobs of the most diverse character. If the overtime provisions

[16] 29 U.S.C.A. 207(j) (1966 Cum. Supp.).

of the 1966 Amendments are valid, many of those arrangements may no longer be possible. The Act will seriously hamper the organizational and budgetary functions of the States by forcing them to favor employees of their hospitals and schools over other programs such as welfare and law enforcement, unless the States rearrange their entire civil service and appropriate additional sums for employees not covered by the Act.

For reasons stated above, I am satisfied that a line must be drawn, and that with respect to some if not all state employees covered by the 1966 Amendments the overtime requirements of the Act probably go beyond the permissible limits. The interference with the organizational and budgetary functions of the States has been noted. On the other hand, Congress has not stated, and neither the committee hearings nor the stipulated facts in this case show, what if any effect on interstate commerce the overtime practices of the several States may have. The issue in each instance is whether the particular regulation *unduly* interferes with one or more indispensable sovereign functions of the State. This indicates that the question whether the application of the overtime provisions of the statute to state employees goes beyond the permissible limits should be decided in the context of particular cases, when the extent of the interference with an indispensable state function can be weighed against the effect, if any, which the State's overtime practices have on interstate commerce.[17]

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[17] At the hearing of this case the Solicitor of Labor argued for all of the defendants. He was asked from the Bench whether and where a line should be drawn. Without conceding that any line should be drawn in this case, and without withdrawing from his position that the plenary power of the federal government over interstate commerce applies to the States as well as to individuals, the Solicitor suggested: "* * * we have such a variety of situations that it may not be the path of wisdom to try to issue any blanket rule [to cover] the variety of different situations demonstrated [by the stipulations with respect to] Maryland, Ohio and Texas, and which can be assumed to exist in a multiplicity of cases throughout the fifty states." Tr. p. 193. The Solicitor concluded "that this is not the appropriate place and case for blanket injunctions or orders on a blanket basis so far as the application of this rule to schools

I conclude that a sweeping injunction at this time would not be proper.

The denial of relief in this case should be without prejudice to the right of the several States and their political subdivisions to challenge the overtime provisions of the Act applicable to employees of the States and their political subdivisions, in future cases presenting specific situations.

NORTHROP, District Judge, dissenting

I am compelled to dissent from the conclusions reached by Judge Winter and Judge Thomsen that this Act is not unconstitutional.

The majority recognizes that this is a case of first impression involving a conflict between Congress' power under the Commerce Clause and state sovereignty as recognized in our Constitution.

Judge Winter concludes that the power of Congress under the Commerce Clause has no boundaries and Congressional preemption in this field is supreme, it mattering not that it would destroy the constitutionally recognized sovereignty of the states. To put it simply, he holds that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than by the will of the people. No case has gone that far. It is supported neither by history nor by the structure of the Constitution.

In his concurring opinion, Judge Thomsen recognizes that there is implicit within the concept of federalism embodied in the Constitution a limitation on the power of

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and hospitals are concerned. Instead, it would seem most appropriate if such a new line were conceived and fashioned, if it should be, that the concept and the fashioning of it should not be for this Court, but by the Supreme Court in any later proceedings, or perhaps, as I have suggested several times before, it should be done as cases actually come up in the future and action is taken where we can get a full exposure of all of the different facts and facets on issues that may well be presented at that future time." Tr. pp. 204, 205.

Congress under the Commerce Clause. However, he feels that the minimum wage provisions of the Act as they affect the states do not transgress the limitation imposed by the Constitution upon Congress. But he expresses serious doubts as to the constitutionality of the overtime provision of the Act as it affects the states. Nevertheless he concludes that question is not yet ripe for adjudication. As to it, he would wait until the Department of Labor promulgates and applies its regulations to the states and decide constitutionality on a case-by-case basis.

Although I agree with Judge Thomsen's analysis of the pertinent cases and some of his reasoning as to the effect of the amendment on the states, I cannot agree with his conclusions. Unless the Department of Labor emasculates the Act, there will be no way for this or some other court to avoid the constitutional question posed herein.

The question before us is whether this Congressional exercise of power under the Commerce Clause constitutes an undue infringement upon the "performance of [the state's] function as a government which the Constitution recognizes as sovereign."

This quotation is from Chief Justice Stone's opinion in New York v. United States, 326 U.S. 572, at 588, 66 S. Ct. 310, at 317, in reference to the limits on the taxing power of Congress. Although it is recognized that the power under the Commerce Clause may be broader, it must have some limits. The language of Chief Justice Stone suggests such a limitation.

We are concerned here with the separation of powers between national and state government established by our Constitution. This concept of federalism has been carefully preserved throughout our history by the courts, not by exhorting the Congress on the one hand or the state legislatures on the other to restrain their actions so as not to trespass on the rights, responsibilities, and duties of the other.

I cannot agree that it is a political question for the state to importune the Congress not to raise the salaries of

state employees, thus forcing the state legislature to tax its people to pay those employees. This is a direct transgression on the concept of federalism, which must be determined by the courts. The case before us is a perfect example of the wisdom of Constitutional rather than Congressional federalism. The amendment, through which the states are subjected to the Fair Labor Standards Act, was enacted without notice to the states so that they might be heard and without any thought being given to the effect of the Act on them. Surely the statement of one Congressman, even in the committee of the whole, did not alert the states, or constitute a Congressional finding, or give this Act a purpose as applied to the states as the majority would wish. [Note 10, Judge Winter's opinion.]

This case then brings into confrontation the powers of Congress under the Commerce Clause with the concept of dual sovereignty or federalism as embodied in our Constitution, which is articulated in the Tenth Amendment.

The effect of this Act must be measured against the Constitution precisely and its impact cannot be softened by what regulation a department of the national government might promulgate in its application.

What then is its effect on the state government?

By this Act Congress is forcing under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state

1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or

2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or

3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or

4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.

The allocation of the state's revenue among government activities is the most important function of state government, for it determines the extent and calibre of service which a state can supply. State governments must provide services out of current tax funds. The state government and its political subdivisions are particularly sensitive to the needs of the people and their ability to pay for the indispensable governmental functions that must be furnished.

The budget is, therefore, under constant study by both the executive and legislative branches of the state's government. Not only does the appropriation bill demand the highest consideration of the legislature while it is in session, but it also requires most of the attention of the executive and the interim legislative committees between sessions.*

There is only so much revenue available. The wise allocation of this money demands this constant up-to-the-minute knowledge of state and local governmental officials intimately concerned with the requirements and priorities to be allotted among the health, welfare, education, law enforcement, urban, pollution, and other demanding governmental functions, each of substantial importance. The states' Congressional delegations neither have the time, nor knowledge, nor is it their function to become involved in the vital details of state fiscal policy.

Perhaps all of the above can be expressed more graphically by a recent news story in the Baltimore Sun, which undoubtedly is repeated hundreds of times across the nation:

> "It is budget time again in Howard County. . . .
>
> "What particularly worries the commissioners is that the school budget [the largest expenditure of the

* For example, consider the reports of the Maryland General Assembly's Committee on Taxation and Fiscal Affairs from 1955 to date, the Maryland Legislative Council's Report for any year and countless other such documents reflecting the prodigious amount of time and effort put forth by state officials to supply governmental services. These documents may be found in the Archives of the Council of State Governments.

county government] has gone up on an average of 22 per cent each year while the taxable income goes up only 15 per cent and assessments only 9 per cent." The Evening Sun (Baltimore), April 6, 1967.

The impact of a mandatory allocation of state-collected revenues by Congress among the indispensable state governmental services is thus readily demonstrated. It amounts to the national government compelling state government action and controlling and operating the state government with little or no knowledge of the requirements of its citizens or the financial ability of those citizens to pay the bill.

The Congress, under the theory of this Act, can manipulate state governments by increasing the state functions to come under the "enterprise" concept or removing exemptions for classes of state employees at will without notice to the state, and all at the expense of the state. This Act is thus an intrusion of first magnitude into the functioning of state government now, is potentially without limit, and carries with it the formula for the destruction of the concept of federalism.

Congress has heretofore carefully avoided interjecting the national power into state or local governmental functions. Although grants-in-aid and matching funds might have that effect, these have a contractual basis — a far cry from mandatory direction. This Congressional reluctance in and of itself indicates a recognition of the Constitutional principle of federalism.

The careful nurturing of the concept of federalism has come to fruition since World War II in the increasing initiative of the states in meeting new problems brought about by the great social changes in our nation. The momentous "Metropolitan Problem" has caused the creation of new forms of local government in many of the affected areas. The wisdom of local administration has been clearly demonstrated. We are seeing many more govenmental activities being undertaken by the federal and state governments on a recognized partnership basis

directed at solving our internal problems. In light of the above examples of voluntary movement toward national and state partnership, rather than compulsion, it would indeed be tragic at this point in history to expand and broaden the power of the federal government over the state governments in the exercise of their necessary governmental functions under the guise of the "Commerce Clause" to a point never heretofore reached by any decision. To substitute now the delayed and ponderous action of a remote central government would atrophy and stifle this progress.

Alexis de Tocqueville in his *Democracy in America* said it in this manner:

> ". . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation." Vol. I, pp. 86-87 (Bradley ed., New York, 1946).

Thus, the limitation upon a power, which has been delegated to the federal government — including the power to regulate commerce among the states — and which deals with the internal affairs of this nation, is reached when Congress exercises that power so as to interfere unduly in some manner with the state's performance of an indispensable governmental activity. The Act as applied to employees of public schools, hospitals, and related institutions is unconstitutional because it is an undue infringement upon the performance of an indispensable and fundamental governmental function (its taxing and budgetary function) of the state, which the Constitution recognizes as sovereign.

The proof of the wisdom of the federal concept is implicit in the name of our government — the "United States". It cannot be said more succinctly.

JUDGMENT

(Filed June 26, 1967)

This cause having come on for final argument and the parties having agreed to present this case for final decision on a stipulated record; and the plaintiffs in their complaints having prayed for a declaratory judgment and a preliminary and permanent injunction; and the court having received argument and briefs from the parties; now therefore, this 26th day of June, 1967, it is

ORDERED, ADJUDGED AND DECREED:

Plaintiffs' motion for summary judgment and prayers for interlocutory and permanent injunctive relief are denied for the reasons set forth in the opinions of the Court.

Accordingly, this action is dismissed without costs to either party.

/s/ HARRISON L. WINTER,
Circuit Judge.

/s/ ROSZEL C. THOMSEN,
District Judge.

.....
District Judge.

APPENDIX B

TEXT OF FAIR LABOR STANDARDS ACT AS AMENDED IN 1966

Act of June 25, 1938, as amended by Fair Labor Standards Amendments of 1949 (Public Law 393, 81st Congress), effective January 25, 1950, and by Fair Labor Standards Amendments of 1955 (Public Law 381, Chapter 867, 84th Congress, 1st Session), approved August 12, 1955, further amended by H.R. 7458 (Public Law 85231, 85th Congress, 1st Session), approved August 30, 1957, effective November 28, 1957; amended by P.L. 85-750, approved August 25, 1958; by the Judicial Review Act, P.L. 85-791, approved August 28, 1958; by the Fair Labor Standards Amendments of 1961, P.L. 87-30, approved May 5, 1961, effective September 3, 1961; by the Equal Pay Act of 1963, approved June 10, 1963, effective June 11, 1964, and by P.L. 89-601, approved September 23, 1966, effective February 1, 1967. Annotations in brackets show changes made by amendments.

Section

1. Title.
2. Finding and declaration of policy.
3. Definitions.
4. Administrator.
5. Industry committees for Puerto Rico and the Virgin Islands.
6. Minimum wages.
7. Maximum hours.
8. Wage orders.
9. Attendance of witnesses.
10. Court review.
11. Investigations, inspections, and records.
12. Child labor provisions.
13. Exemptions.
14. Learners, apprentices, and handicapped workers.
15. Prohibited acts.

16. Penalties.
17. Injunction proceedings.
18. Relations to other laws.
19. Separability of provisions.

AN ACT

TO PROVIDE FOR THE ESTABLISHMENT OF FAIR LABOR STANDARDS IN EMPLOYMENT IN AND AFFECTING INTERSTATE COMMERCE, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. That this Act may be cited as the "Fair Labor Standards Act of 1938."

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

[Sec. 2 of P. L. 81-393, effective Jan. 25, 1950, added the words "and with foreign nations" in the fifth line of subsection (b) above.]

DEFINITIONS

Sec. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

[The concluding words "between any State and any place outside thereof" were substituted by Section 3(a) of P. L. 81-393, effective Jan. 25, 1950, for the original words "from any State to any place outside thereof."]

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(d) was amended by P. L. 89-601, effective Feb. 1, 1967, by inserting after "of a State" the phrase beginning "(except with respect" and ending "such sentence)".

(e) "Employee" includes any individual employed by an employer, except that such term shall not, for the purposes of section 3(u) include—

[e] (1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

[e] (2) any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year.

[Section 3(e) was amended by P. L. 89-601, effective Feb. 1, 1967, to add the exceptions provided in paragraphs (1) and (2).]

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry, or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any

part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

[Section 3(b) of P.L. 81-393, effective Jan. 25, 1950, inserted, before the word "process" in the third line from the end of this subsection, the words "closely related." In addition, after the word "occupation" in the same line, it deleted the word "necessary" and substituted the words "directly essential." The last portion of the subsection had previously read: "or in any process or occupation necessary to the production thereof, in any State."]

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find

and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

[Section 3(c) of P. L. 81-393, effective Jan. 25, 1950, added the language in the last part of the parentheses which occurs in lines 5 to 16 in subsection (1) above. The language is: "or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being"]

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers

similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

[Section 3(m) was amended to add the last two provisos by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective Sept. 3, 1961. This section was further amended by P.L. 89-601, effective Feb. 1, 1967, by adding the sentence beginning "In determining the . . ." and ending "such lesser amounts."]

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

[Section 3(n) was added by Section 3(d) of P.L. 81-393; it was further amended to add the phrase "except as used in subsection (s)(1)" after the term "resale" by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective September 3, 1961. This paragraph was further amended by P.L. 89-601, effective Feb. 1, 1967, by striking out the words "except as used in subsection (s) (1)," immediately following "Resale."]

(o) Hours Worked — In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

[Subsection (o) was added by Section 3(d) of P.L. 81-393, effective Jan. 25, 1950.]

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: Provided, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or

service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), shall be deemed to be activities performed for a business purpose.

[Section 3(r) was amended by P.L. 89-601, effective Feb. 1, 1967, by adding at the end thereof the language beginning "For the purposes . . ." and ending ". . . for a business purpose."]

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose an-

nual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated;

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employee the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

[Section 3 was amended to add subsections (p), (q), (r), and (s) by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective Sept. 3, 1961. Section 3(s) was amended by P.L. 89-601, effective Feb. 1, 1967, to substitute virtually entirely new language. Prior to the amendment, Section 3(s) read as follows:

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

"(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

"(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

"(3) any establishment of any such enterprise except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

"(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

"(5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excises taxes at the retail level which are separately stated:

"Provided, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner

thereof or persons standing in the relationship of parent, spouse, or child of such owner."]

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

[Section 3 was amended by P.L. 89-601, effective Feb. 1, 1967, to add subsections (t), (u), (v), and (w).]

ADMINISTRATOR

Sec. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $26,000 a year.

[Section 4 of P. L. 81-393 effective Jan. 25, 1950, substituted "$15,000" in the last line of the subsection above for "$10,000" in the original statute. The salary then was raised to $20,000 and in 1964 to $26,000 by P. L. 88-426.]

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator

may establish and utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney-General. In the appointment, selection, classification and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his daily authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.

[Sec. 4(d) was amended by Sec. 2 of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to add the last two sentences.]

Investigations of Effects on Employment of Foreign Competition

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased

unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: Provided, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

[Sec. 4 was amended to add subsection (e) by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

SPECIAL INDUSTRY COMMITTEES FOR PUERTO RICO AND VIRGIN ISLANDS

Sec. 5. (a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in Puerto Rico or the Virgin Islands, engaged in commerce or in the production of goods for commerce, or employed in any enterprise engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 8.

[Section 5(a) was amended by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effec-

tive September 3, 1961, to insert after the words "production of goods for commerce" wherever they appear the phrase "or employed in any enterprise engaged in commerce or in the production of goods for commerce."]

[Sec. 5(a) was amended by Sec. 5(a) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, by striking out "and the administrator" in the last sentence. The sentence previously read: "In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committee" and the Administrator shall be subject to the provisions of section 8.]

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

[This subsection was reenacted by Section 5 of P: L. 81393 effective Jan. 25, 1950.]

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall

by rules and regulations prescribe the procedure to be followed by the committee.

[This subsection was reenacted by Section 5 of P. L. 81-393 effective Jan. 25, 1950.]

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

[Section 5 of P. L. 81-393 effective Jan. 25, 1950, reenacted the above subsection. It also deleted a subsection (e) which read as follows:

"(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommended the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifi-

cations, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

"No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands."]

MINIMUM WAGES

Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

[Sections 6(a) and 6(a)(1) were amended by P. L. 89-601, effective Feb. 1, 1967, by deleting all existing material and inserting in its place the new material beginning "Every employer shall . . ." and ending ". . . provided in this section;" Sec. 6(a)(1) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961, to raise the minimum from $1.00 an hour to $1.15 on Sept. 3, 1961, and to $1.25 in 1963." The $1-an-hour minimum was incorporated into the law by Sec. 3 of the Fair Labor Standards Amendments of 1955, approved Aug. 12, 1955, and made effective March 1,

1956. This minimum superseded an hourly minimum of 75 cents.

Previously, Sec. 6(a) of P. L. 81-393, effective Jan. 25, 1950, substituted "75 cents an hour" for the following four subparagraphs in the original statute.

"(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"(2) during the next six years from such date, not less than 30 cents an hour.

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."]

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power, without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the methods and procedure for ascer-

taining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

[The above subparagraph, unchanged from the original law, was renumbered as "(2)" by Section 6(b) of P. L. 81-393, effective Jan. 25, 1950.]

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rates prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than $1 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, not less than $1.15 an hour during the second year from such date, and not less than $1.30 an hour thereafter.

[Sec. 6(a)(3) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956. The subsection was further amended by the Fair Labor Standards Amendments of 1961 to substitute the first sentence for the following: "if such employee is employed in American Samoa, at less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are now applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act." This section was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing the period at the end of the preceding paragraph to a semicolon and adding paragraph (5).]

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments make to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

[Section 6(b) was amended by P. L. 89-601, effective Feb. 1, 1967, by deleting all existing material and inserting in its place the new material beginning "Every employer shall . . ." and ending with subsection 6(b)(5). Prior to the amendment, Section 6(b) read as follows:

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement)."]

(c)(1) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5.

(2) In the case of any such employee who is covered by such a wage order and to whom the rate or rates prescribed by subsection (a) would otherwise apply, the following rates shall apply:

(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, increased by 12 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1966 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

(B) Beginning one year after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 16 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend

the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1966 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) In the case of any such employee to whom subsection (a)(5) or subsection (b) would otherwise apply, the Secretary shall within sixty days, after the effective date of the Fair Labor Standards Amendments of 1966 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, but not in excess of the applicable rate provided by subsection (a)(5) or subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (a)(5) or subsection (b), as the case may be. The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1966.

(4) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

[Section 6(c) was amended by P.L. 81-609, effective Feb. 1, 1967, by deleting all existing material and inserting 6(c) (1) through (4)] in its place. Prior to the amendment it read as follows:

"(c) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5: Provided, That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate, or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rate prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in

Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, the compliance with any applicable rate or rates prescribed by pargarph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums

recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8 except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in ex-

cess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.".

[Section 6(c) was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

> "(c) The provisions of paragraph (1) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and in so far as such employee is covered by a wage order heretofore or hereafter issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5: Provided, That the wage order in effect prior to the effective date of this Act for any industry in Puerto Rico or the Virgin Islands shall apply to every employee in such industry covered by subsection (a) of this section until superseded by a wage order hereafter issued pursuant to the recommendations of a special industry committee appointed pursuant to section 5."]

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying

a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[Section 6(d) was added by the Equal Pay Act of 1963, approved June 10, 1963, effective June 11, 1964. Section 4 of this Act reads as follows:

> "Sec. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: Provided, that in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur."]

(e)(1) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof),

every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

[Section 6 was amended by P. L. 89-601 effective Feb. 1, 1967, to add subsection (e).]

MAXIMUM HOURS

Sec. 7 (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the produc-

tion of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(a) was amended by P.L. 81-609, effective Feb. 1, 1967, by deleting all existing material and inserting 7(a)(1) through 7(a)(2)(C) in its place. Prior to the amendment it read as follows:

"Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

"(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s) (1) or (4), or by an establishment described in section 3(s) (3), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be

within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 13 of this Act by the Fair Labor Standards Amendments of 1961—

"(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

"(B) for a workweek longer than forty-two hours during the fourth year from such date,

"(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(a) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by designating the subsection "(a)(1)", by inserting after the word "who" the words "in any workweek" and by striking out the period at the end and inserting a semicolon and the word "and" and by adding the paragraph (2) above. Previously the subsection read as follows:

> "Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."]

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

[Section 7(b) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "in excess of forty hours in the workweek" in paragraph (2) and inserting the phrase "in excess of the maximum workweek applicable to such employee under subsection (a)."]

[In the fifth line of subparagraph (1) of this subsection, Section 7 of P. L. 81-393, effective Jan. 25, 1950, substituted "one thousand and forty" for "one thousand." It also substituted new language in subparagraph (2). The latter subparagraph in the original Act read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employees shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks."]

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale.

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(b)(3) was amended by P.L.89-601, effective Feb. 1, 1967, to delete the existing paragraph and replaces it with the new Section 7(b)(3). Prior to the amendment, the paragraph dealt with the exemption for seasonal industries, which was revised and incorporated in Section 7(c) below, and read as follows:

"(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

And if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

A paragraph similar to the present Section 7(b)(3) previously appeared in Section 13(b)(10).]

(c) For a period or periods of not more than ten workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (d) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection if such employee (1) is employed by such employer in an industry found by the Secretary to be of a seasonal nature, and (2) receives compensation for employment by such employer in excess of ten hours in any workday, or for employment by such employer in excess of fifty hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(d) For a period or periods of not more than ten workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (c) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer in an enterprise which is in an industry found by the Secretary—

(A) to be characterized by marked annually recurring seasonal peaks of operation at the places of first marketing or first processing of agricultural or horticultural commodities from farms if such industry is engaged in the handling, packing, preparing, storing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, or

(B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, and

(2) receives compensation for employment by such employer, in excess of ten hours in any workday, or for employment in excess of forty-eight hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(c) was amended and Section 7(d) was added by P.L. 89-601, effective Feb. 1, 1967. The new paragraphs revise the seasonal-industry and first-processing exemptions previously provided by Sections 7(b)(3) and 7(c). Prior to the amendment, Section 7(c) read as follows:

"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonable fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period

or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged in."

The addition of Section 7(d) required a redesignation of Sections 7(e), (f), (g), and (h) below.]

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

[e] (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

[e] (3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust, or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard, among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the pay-

ments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

[e] (4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

[e] (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

[Subparagraph 7(e)(5) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty in a workweek" and inserting the phrase "in excess of the maximum workweek applicable to such employee under subsection (a)."]

[e] (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; or

[e] (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in

good faith by the contract or agreement for like work performed during such workday or workweek.

[Subsection (e), which was (d) before the 1966 amendments, was added by Section 7 of P. L. 81-393, effective Jan. 25, 1950. Subparagraphs (6) and (7) incorporate a portion of Section 1 of the Overtime Act (see annotation to Sec. 7(f) below).

[Subparagraph 7(e)(7) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty hours" and inserting the phrase "the maximum workweek applicable to such employee under subsection (a)."]

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

[Section 7 of P. L. 81-393, effective Jan. 25, 1950, enacted the above subsection to replace the prior Section 7(e), which had been added by Section 1 of the Overtime Act (P. L. 177, 81st Congress). The language superseded was as follows:

"(f) For the purpose of computing overtime compensation payable under this section to an employee

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day

of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

The content of the former Section 7(f) is incorporated in subparagraph (6) and (7) of Section 7(e) and in Section 7(g).]

[Subsection 7(f), which was (e) before the 1966 amendments, was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by (1) striking out "forty-hours" and inserting the phrase "the maximum workweek applicable to such employee under subsection (a)", (2) striking out "section 6(a)" and inserting "subsection (a) or (b) (whichever may be applicable)", and (3) striking out "forty in any" workweek and inserting "such maximum" workweek.]

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the

amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

[Subsection 7(g), which was (f) before the 1966 amendments, was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty hours" both times it appears and inserting the phrase "the maximum workweek applicable to such employee under such subsection—".]

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

[The above subsection was added by section 7 of P. L. 81-393, effective Jan. 25, 1950.]

(h) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

[This subsection, which was (g) before the 1966 amendments, was added by Section 7 of P. L. 81-393, effective Jan. 25, 1950. It incorporates part of Section 1 of the Overtime Act (see annotation to Sec. 7(f) above.]

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods of services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

[Section 7(i), which was (h) before the 1966 amendments, was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.] Subsection (i) was amended by P.L. 81-609, effective Feb. 1, 1967, by adding at the end thereof the sentence beginning "In determining . . ." and ending ". . . or guarantee."]

[Subsection (d), (e), (f), (g), and (h) of Section 7 were redesignated as subsections (e), (f), (g), (h), and (i) respectively by P.L. 89-601, effective Feb. 1, 1967.]

(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at be-

tween the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(j) was added by P.L. 89-601 effective Feb. 1, 1967.]

WAGE ORDERS IN PUERTO RICO AND VIRGIN ISLANDS

Sec. 8. (a) The policy of this Act with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage prescribed pursuant to paragraph (1) of section 6(a) in each such industry. The Administrator shall from time to time convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classification therein. Minimum rates of wages established in accordance with this section which are not equal to the minimum wage rate prescribed in paragraph (1) of Section 6(a) shall be reviewed by such committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

[Sec. 8(a) was amended by Public Law 85-750, 85th Congress, H.R. 12967, approved August 25, 1958, to add the last sentence.

Section 8 of P. L. 81-393, effective Jan. 25, 1950, substituted the above form of this subsection, except for the last sentence, for subsection 8(a) of the original statute, which read as follows:

"(a) with a view to carrying out the policy of this Act by reaching as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein.

The subsection was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by inserting after the word "industries" in the first sentence the words "or enterprises"; and by inserting after words "production of goods for commerce" in the second sentence the phrase "or in any enterprise engaged in commerce or in the production of goods for commerce".]

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry and will not give any

industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

[Sec. 8(b) was amended by Sec. 5(b) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, by striking out the word "may" following the words "or any authorized subcommittee thereof" and inserting the words "shall after due notice."

Section 8 of P. L. 81-393, effective Jan. 25, 1950, added the following words at the end: "and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands."]

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that prescribed pursuant to paragraph (2) of section 6(a)) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum-wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

[Sec. 8(c) was amended by Sec. 5(c) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955 to strike out "and the administrator" in the clause immediately above. It previously read: "but the industry committee and the administrator shall consider among other relevant factors the following:"]

(1) competitive conditions as affected by transportation, living and productions costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

[Section 8 of P.L. 81-393, effective Jan. 25, 1950, deleted the words "for any industry" which, in the original statute occurred in the first line of this subsection after the words "Committee". It also substitutes the words "not in excess of that prescribed pursuant to paragraph 2 of Section 6(a)," which appear in parenthesis in lines 7-9 of this subsection. The parenthetical words in the original statute "were not in excess of 40 cents an hour."]

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

[Sec. 8(d) was amended by Sec. 5(d) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to substitute the above subsection (d) for that which previously read as follows:

"(d) the industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due

notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose) for further consideration and recommendations."

The above subsection was reenacted by Sec. 8 of P.L. 81-393, effective Jan. 25, 1950.]

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

[Sec. 8(e) was amended by Sec. 5(e) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to strike out the last sentence which read:

"No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance."

Section 8 P.L. 81-393, effective Jan. 25, 1950, deleted the former subsection (e) and substituted the paragraph immediately above together with the deleted sentence. The former subsection 8(e) read as follows:

"(e) No order issued under this section with respect

to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."]

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

[The above Section 8(f), as renumbered by Section 8 of P.L. 81-393, effective Jan. 25, 1950, was subsection (g) of the original act.]

ATTENDANCE OF WITNESSES

Sec. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

COURT REVIEW

Sec. 10. (a) Any person aggrieved by an order of the Secretary issued under section 8 may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within

60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Section 1254 of title 28 of the United States Code.

[Sec. 10(a) was amended by Sec. 5(f) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to substitute "Secretary" and "in-

dustry committee" for "Administrator." The section was further amended by the Judicial Review Act (P.L. 85-791), approved August 28, 1958, to revise the second and third sentence to read as above.]

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

Sec. 11. (a) The Administrator or his designated representatives, may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State Labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and

duties under this Act, utilize the service of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

[This subsection was added by Section 9 of P.L. 81-393, effective Jan. 25, 1950.]

CHILD LABOR PROVISIONS

Sec. 12. (a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That any such shipment or delivery for shipment or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed

prohibited by this subsection: And provided further, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

[Section 10(a) of P.L. 81-393, effective Jan. 25, 1950, deleted the following words from the beginning of the above subsection: "After the expiration of 120 days from the date of the enactment of this Act." It added also the first proviso beginning at line 9 and ending at line 20 ("That any such shipment * * * prohibited by this subsection, and provided further").]

(b) The Secretary of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawfull by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

[This subsection was added by Section 10(b) of P.L. 81-393, effective Jan. 25, 1950. It was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961 to add this phrase at the end of the sentence; "or in any enterprise engaged in commerce or in the production of goods for commerce."]

EXEMPTIONS

Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

[Section 13(a)(1) in the original statute declared:

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or".]

[Section 13(a)(1) was amended by P.L. 89-601, effective Feb. 1, 1967, to add "(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary school)".]

[a] (2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4)), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section

3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated):

[Section 13(a)(2) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting the first five paragraphs and inserting a new paragraph. Prior to the amendments, the provisions read as follows:]

"[a](2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

"(i) is not in an enterprise described in Section 3(s), or

"(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theatre; or in an amusement or recreational establishment that operates on a seasonal basis, or

"(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physical or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000."

[Section 13(a)(9) below provides an exemption similar to that provided in the deleted paragraph (ii).]

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

[a] (3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such years; or

[Section 13(a)(3), which provided an exemption for laundries and dry cleaning establishments, was repealed by P.L. 89-601, effective Feb. 1, 1967, and the new paragraph dealing with amusement or recreational establishments inserted in its place. The laundry and dry cleaning exemption was incorporated in Section 13(a)(2) above. Prior to the amendments, Section 13(a)(3) read as follows:

[a] (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: Provided, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communication business; or"

[a] (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

[Subparagraphs (2), (3), and (4), as they read prior to the 1961 and 1966 amendments, were inserted by Section 11 P. L. 81-393, effective Jan. 25, 1950, in place of the former subparagraph (2), which read as follows:

"(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."]

[a] (5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee: or

[Section 13(a)(5) was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

"(a)(5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or by-products thereof; or"

Section 11 of P.L. 81-393, effective Jan. 25, 1950, added "(other than canning)" after the word "processing" in the above text and deleted the word "canning" which, in the original statute, occurred after the word "freezing."]

[a] (6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child,

or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

[Section 13(a)(6) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting the existing paragraph and substituting the paragraph above. Prior to the amendments, Section 13(a)(6) read as follows:

> "[a](6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or"

Section 11 of 81-393, effective Jan. 25, 1950, added in the above paragraph, these words in lines 2 to 8: "or in connection with * * * agricultural purposes."

See Section 13(b)(12) below for a new overtime exemption for employees of non-profit irrigation companies.]

[a] (7) any employee to the extent that such employee is exempted by regulations, orders, or certificates of the Secretary issued under section 14; or

[Section 13(a)(7) was amended to substitute "the Secretary" for "the Administrator" by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. This section was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing "or orders" to "orders, or certificates".]

[a] (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county. where published or counties contiguous thereto; or

[Section 13(8)(a) was amended by P.L. 89-601, effective Feb. 1, 1967, by substituting "where published" for "where printed and published".]

[a] (9) any employee employed by an establishment which is a motion picture theatre; or

[Section 13(a)(9), which provided an exemption for employees of local transit systems, was deleted by P.L. 89-601, effective Feb. 1, 1967, and replaced by the paragraph above providing an exemption for employees of motion picture theaters. A similar exemption previously was provided by Section 13(a)(2)(ii). Prior to the amendments, Section 13(a)(9) read as follows:

"[a](9) any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, not in an enterprise described in section 3(s)(2); or"

[Section 13(a)(9) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to delete the phrase "not included in other exemptions contained in this section"; and to substitute the phrase "not in an enterprise described in section 3(s)(2)."]

[Section 13(a)(10) was deleted and the subsequent paragraphs were renumbered by P.L. 89-601, effective Feb. 1, 1967. Prior to the amendments, Section 13(a)(10) read as follows:

"[a] (10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or"

[a] (10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

[Section 11, now (10), of P. L. 81-393, effective Jan. 25, 1950, substituted in the last two lines of this paragraph the words "not more than seven hundred and fifty stations" for the words "less than five hundred stations."

Section 13(a)(11), now (10) was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to delete the phrase "in a public telephone exchange" following the word "employed" and to insert the phrase "by an independently owned public telephone company."]

[Section 13(a)(12) was deleted by P.L. 89-601, effective Feb. 1, 1967, and Section 13(a)(13) was renumbered Section 13(a)(11). Prior to the amendments, Section 13(a)(12) provided an exemption for "any employee of an employer engaged in the business of operating taxicabs." A new Section 13(b)(17) below restricts the exemption to the overtime provisions and to "drivers" of an employer engaged in the business of operating taxicabs.]

[a] (11) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or

service establishment under clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or

[Section 13(a)(13), now (11) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert the phrase "which qualifies as an exempt retail or service establishment under clause (2)" after the word "establishment." The paragraph was previously added by Section 11 of P. L. 81-393, effective Jan. 25, 1950.]

[a](12) any employee employed as a seaman on a vessel other than an American vessel; or

[Section 13(a)(14), now (12), was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert the phrase "on a vessel other than an American vessel" after the word "seaman." The paragraph, numbered as subparagraph (3) in the original statute, was reenacted by Section 11 of P.L. 81-393, effective Jan. 25, 1950, with the above number.]

[a] (13) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

[This paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950. It was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing the number of employees permitted for the exemption from "twelve" to "eight."]

[a] (14) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and bailing) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

[Section 13(a)(21), now (14), was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. It was amended by P.L. 89-601, effective Feb. 1, 1967, by changing the semicolon at the end to a period.]

[In addition to deleting Sections 13(a)(10) and (12), P.L. 89-601, effective Feb. 1, 1967, deleted Sections 13(a)(16) (17), (18), (19), (20), and (22), and Sections 13(a)(11), (13), (14), (15) and (21) were renumbered as Sections 13(a)(10), (11), (12), (13), and (14). Prior to the amendments, the deleted subsections (16), (17), (18), (19), (20), and (22) read as follows:

"[a](16) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1); or

[Section 13(a)(16) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961; effective Sept. 3, 1961.]

"[a](17) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm:

Provided, That no more than five employees are employed in the establishment in such operations; or"

[Section 13(a)(17) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](18) any employee engaged in ginning of cotton for market, in any place of employment located in a country where cotton is grown in commercial quantities; or"

[Section 13(a)(18) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

[a](19) any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implement; or"

[Section 13(a)(19) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](20) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or"

[Section 13(a)(20) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](22) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables."

[Section 13(a)(22) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or

[b] (2) any employee of an employer subject to the provisions of part I of the Interstate Commerce Act; or

[b] (3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act, or

[The above paragraph, formerly subparagraph (4) of subsection (a) of Section 13, was reenacted unchanged, but numbered as shown. Section 11 of P. L. 81-393, effective Jan. 25, 1950.]

[b] (4) any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof; or

[Section 13(b)(4) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert, the phrase "processing, marketing, freezing, curing, storing, packing for shipment, or distributing" following the word "canning". The paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950.]

[b] (5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

[This paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950.]

[b] (6) any employee employed as a seaman; or

[Section 13(b)(6) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

(7) any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency; or

[Section 13(b)(7) was amended by P.L. 89-601, effective Feb. 1, 1967, to limit the exemption as specified above. Prior to the amendments, the exemption applied to "any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier."]

(8) any employee employed by an establishment which is a hotel, motel, or restaurant; or any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

[Section 13(b)(8), which provided an exemption from the overtime requirements, for "any employee of a gasoline service station" was deleted by P.L. 89-601, effective Feb. 1, 1967, and was replaced by the above exemption. See Section 3(s)(1) above for the "enterprise" coverage test for gasoline stations. Also see Section 3(s)(4) above for coverage of hospitals and Section 13(a)(2) for exemption for retail or service establishments.]

[b] (9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the

major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

[Section 13(b)(9) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

[b] (10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or

[Section 13(b)(10), which provided an overtime exemption for employees of certain distributors of petroleum, was deleted by P.L. 89-601, effective Feb. 1, 1967, and was replaced by the exemption provided above. Section 13(a)(19) previously provided a similar exemption from both the minimum-wage and overtime requirements for the employees described above. Prior to the amendments, Section 13(b)(10) read as follows:]

"[b](10) any employee of an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if (A) the annual gross volume of sales of such enterprise is not more than $1,000,000 exclusive of excise taxes, and (B) more than 75 per centum of such enterprise annual dollar volume of sales is made within the State in which such enterprise is located, and (C) not more than 25 per centum of

the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale; or who are engaged in the bulk distribution of such products for resale; or"

[The exemption for the bulk distribution of petroleum products was transferred to Section 7(b)(3).]

[b] (11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a); or"

[Section 13(b)(11) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961. This section was further amended by P.L. 89-601, effective Feb. 1, 1967, by changing the period at the end of paragraph (11) to a semicolon and inserting "or" and adding new paragraphs (12), (13), (14), (15), (16), (17), (18), and (19).]

[b](12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing or water for agricultural purposes; or

[Section 13(b)(12) is similar to language deleted from Section 13(a)(6), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employ-

ment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operation at a wage rate not less than that prescribed by section 6(a)(1); or

[Section 13(b)(13) is similar to the deleted Section 13(a)(16), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

[Section 13(b)(14) is the same as the deleted Section 13(a)(17), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](15) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (other than refined sugar) or syrup; or

[Section 13(b)(15) is the same as to the deleted Section 13(a)(18), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

[Section 13(b)(16) is the same as the deleted Section 13(a)(22), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](17) any driver employed by an employer engaged in the business of operating taxicabs; or

[Section 14(b)(17) replaced Section 13(a)(12), which provided an exemption from both the minimum-wage and overtime requirements for "*any employee* employed by an employer engaged in the business of operating taxicabs." The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[Section 13(b)(18) is the same, as the deleted Section 13(a)(20), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](18) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or

[Section 13(b)(18) is the same as the deleted Section 13(a) 20, which provided an exemption from both the minimum-wage and overtime requirements. The

changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](19) any employee of a bowling establishment if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 13(b)(19) was added by P.L. 89-601, effective Feb. 1, 1967.]

(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.

(c)(2) The provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(c)(3) The provisions of section 12 relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

[Section 13(c) was amended by P.L. 89-601, effective Feb. 1, 1967, by adding paragraphs (1), (2), and (3). Prior to the amendments, Section 13(c) read as follows:

"(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed or to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions"]

[The Section previously was amended by P.L. 81-393, effective Jan. 25, 1950, which made three changes in this paragraph. First, it substituted these words in lines 4-7, "outside of school hours for the school district where such employee is living while he is so employed," replacing the prior language, "while not legally required to attend school." Second, it added the words "or performer" after the word "actor" in the third line from the end. Third, it added the last six words, "or in radio or television productions."]

(d) The provisions of sections 6, 7, and 12 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths.)

[Section 13(d) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 4, 1961, to insert the following at the end of the sentence: "or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths)." The subsection, as it read before the 1961 amendments, was added by section 11 of P.L. 81-393, effective Jan. 25, 1950.]

(e) The provisions of section 7 shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 6 (a) (3), except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 7 if he shall find, after a public hearing on the matter, and taking into account the

factors set forth in section 6 (a) (3), that economic conditions warrant such action.

[Sec. 13(e) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956.]

(f) The provisions of Sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Alaska; Hawaii; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (Ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone.

[Sec. 13(f) was added by amendment approved August 30, 1957 (Public Law 85231, H.R. 7458, effective November 29, 1957). [Section 13(f) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting "and the Canal Zone" and inserting in its place "Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone."]

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

Sec. 14. (a) The Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students, regardless of age but in compliance

with applicable child labor laws, on a part-time basis in retail or service establishments (not to exceed twenty hours in any workweek) or on a part-time or full-time basis in such establishments during school vacations, under special certificates issued pursuant to regulations of the Secretary, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6, except that the proportion of student hours of employment to total hours of employment of all employees in any establishment may not exceed (1) such proportion for the corresponding month of the twelve-month period preceding May 1, 1961, (2) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered by this Act for the first time on or after the effective date of the Fair Labor Standards Amendments of 1966, such proportion for the corresponding month of the twelve-month period immediately prior to such date, or (3) in the case of a retail or service establishment coming into existence after May 1, 1961, or a retail or service establishment for which records of student hours worked are not available, a proportion of student hours of employment to total hours of employment of all employees based on the practice during the twelve-month period preceding May 1, 1961, in (A) similar establishments of the same employer in the same general metropolitan area in which the new establishment is located, (B) similar establishments of the same employer in the same or nearby counties if the new establishment is not in a metropolitan area, or (C) other establishments of the same general character operating in the community or the nearest comparable community. Before the Secretary may issue a certificate under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

(c) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by certificate or order provide for the employment of full-time students, regardless of age but in compliance with

applicable child labor laws, on a part-time basis in agriculture (not to exceed twenty hours in any workweek) or on a part-time or a full-time basis in agriculture during school vacations, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6. Before the Secretary may issue a certificate or order under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

(d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in

work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term 'work activities centers' shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

[Section 14 was amended by P. L. 89-601, effective Feb. 1, 1967, to delete the existing language and substitute the above. Prior to the amendments Section 14 read as follows:

"Sec. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, of messengers employed primarily in delivering letters and messages, and of full-time students outside of their school hours in any retail or service establishment: Provided, That such employment is not of the type ordinarily given to a full-time employee, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates."

Clause (1) of section 14 previously was amended by the Fair Labor Standards Amendments of 1961,

approved May 5, 1961, effective Sept. 3, 1961, by striking out "and" after "apprentices" and inserting after "messages," the following "and of full-time students outside of their school hours in any retail or service establishment: Provided, That such employment is not of the type ordinarily given to a full-time employee."

Section 12 of P.L. 81-393, effective Jan. 25, 1950 substituted the word "primarily" for "exclusively" after the word "employed" in the seventh line of this section.]

PROHIBITED ACTS

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

[Section 13(a) of P.L. 81-393, effective Jan. 25, 1950, added the last 11 lines in this paragraph, namely: "and

except that such transportation * * * deemed unlawful."]

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c), or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

[Section 13 (b) of P.L. 81-393, effective Jan. 25, 1950, added the words in lines 3 and 4 of this paragraph which read: "or continued in effect under the provisions of section 11(d)."]

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person

shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection."

[Section 16(b) was amended to add the last sentence by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

(e) The Administrator is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon pay-

ment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Administrator claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Administrator may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Administrator if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Administrator, unless such action is dismissed without prejudice on motion of the Administrator, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

[This subsection (c) was added by Section 14 of P.L. 81-393, effective Jan. 25, 1950. This subsection

was further amended by P.L. 89-601, effective Feb. 1, 1967 by substituting "statutes" for "two-year Statute."]

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in Section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in Section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

[Sec. 16(d) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956). Subsections (1) and (2) were added by amendment approved August 30, 1957 (Public Law 85231, H.R. 7458), effective November 29, 1957.]

INJUNCTION PROCEEDINGS

Sec. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947)."

[Section 17 was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

"Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction for cause shown, to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

This section was rewritten by Section 15 of P.L. 81-393, effective Jan. 25, 1950. The prior text was as follows:

"'The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws" against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, as amended (U. S. C., 1943 edition, title 28, sec. 381) to restrain violations of section 15."]

RELATION TO OTHER LAWS

Sec. 18. (a) No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act, and no provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the

applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

(b) Notwithstanding any other provision of this Act (other than section 13 (f)) or any other law, any employee—

(1) described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082 (7)) whose compensation is required to be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates, and any Federal employee in the Canal Zone engaged in employment of the kind described in such paragraph (7), or

(2) described in section 7474 of title 10, United States Code, whose rates of wages are established to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity, or

(3) employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 7(a)(1) of this Act.

[Section 18 was amended by P.L. 89-601, effective Feb. 1, 1967, by inserting "(a)" immediately after "Sec. 18." and adding subsection "(b)" at the end thereof.]

Separability of Provisions

Sec. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid ,the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Miscellaneous and Effective Date of 1949 Amendments

[Section 16 of Fair Labor Standards Amendments of 1949 (P.L. 81-393, effective Jan. 25, 1950.]

[Effective Date of Amendments]

(a) The amendments made by this Act shall take effect upon the expiration of ninety days from the date of its enactment; except that the amendment made by section 4 shall take effect on the date of its enactment.

[Relation to Portal Act]

(b) Except as provided in section 3(o) and in the last sentence of section 16(c) of the Fair Labor Standards Act of 1938, as amended, no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947.

[Effect on Administrative Rulings and Interpretations]

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administration or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

[Limitation on Employer Liability]

(d) No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act: but, after the expiration of two years from such effective date, no action shall be instituted under section 16(b) of the Fair Labor Standards Act of 1938, as amended, with respect to any liability accruing thereunder for any act or omission, occurring prior to the effective date of this Act.

[Incorporation of Sec. 2 of Overtime Act]

(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had section 7(d)(6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

[Repeal of Overtime Act]

(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.

STUDIES BY SECRETARY AND EFFECTIVE DATE OF 1961 AMENDMENTS

[Sections 13 and 14 of the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961]

[Study Of Agricultural Handling And Processing Exemptions And Rates Of Pay In Hotels, Motels, Restaurants, And Other Food Service Enterprises]

Sec. 13. The Secretary of Labor shall study the complicated system of exemptions now available for the handling and processing of agricultural products under such Act and particularly sections 7(b)(3), 7(c), and 13(a)(10), and the complex problems involving rates of pay of employees in hotels, motels, restaurants, and other food service enterprises who are exempted from the provisions of this Act, and shall submit to the second session of the Eighty-seventh Congress at the time of his report under section 4(d) of such Act a special report containing the results of such study and information, data and recommendations for further legislation designed to simplify and remove the inequities in the application of such exemptions.

[Effective Date]

Sec.14. The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment, except as otherwise provided in such amendments and except that the authority to promulgate necessary rules, regulations, or orders with regard to amendments made by this Act, under the Fair Labor Standards Act of 1938 and amendments thereto, including amendments made by this Act, may be exercised by the Secretary on and after the date of enactment of this Act.

FAIR LABOR STANDARDS AMENDMENTS OF 1966

TITLE VI—MISCELLANEOUS

(Note: The amendments made by Titles I through V of the Fair Labor Standards Amendments of 1966 are integrated into the text of the basic statute.)

STATUTE OF LIMITATIONS

(a) Section 16(c) of such Act is amended by striking out "two-year statute" and by inserting in lieu thereof "statutes".

(b) Section 6(a) of the Portal-to-Portal Act of 1947 (Public Law 49, Eightieth Congress) is amended by in-

serting before the semicolon at the end thereof the following: ", except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued".

Effective Date

Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

Study of Excessive Overtime

The Secretary of Labor is hereby instructed to commence immediately a complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations.

Canal Zone Employees and Panama Canal Study

The Secretary of Labor, in cooperation with the Secretary of Defense and the Secretary of State, shall (1) undertake a study with respect to (A) wage rates payable to Federal employees in the Canal Zone engaged in employment of the kind described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) and (B) the requirements of an effective and economical operation of the Panama Canal, and (2) report to the Congress not later than July 1, 1968, the results of his study together with such recommendations as he may deem appropriate.

Study of Wages Paid Handicapped Clients in Sheltered Workshops

The Secretary of Labor is hereby instructed to commence immediately a complete study of wage payments to handi-

capped clients of sheltered workshops and of the feasibility of raising existing wage standards in such workshops. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such study with appropriate recommendations.

Prevention of Discrimination Because of Age

The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967 his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.